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No.....

In The

Supreme Court of the United States

October Term, 1984

MALCOLM D. WEISS, D.O.,

Petitioner,

v.

YORK HOSPITAL, THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D., HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., SAMUEL W. DEISHER, M.D., JACK A. KLINE, M.D., LOIS M. KUSHNER, M.D., IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Where independent physicians control access to the right to use the unique facilities of a hospital with monopoly power and, acting on behalf of the hospital, unreasonably restrain competition by excluding a class of competing physicians from access to those facilities, are the excluded physicians barred from establishing that this was an unlawful exercise of monopoly power in violation of Section 2 of the Sherman Act simply because they did not compete with the hospital?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are listed in the caption of the case.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Malcolm D. Weiss, D.O., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit which was entered on September 27, 1984 insofar as it reversed the judgment of the District Court holding defendant, York Hospital, liable for injunctive relief on account of violations of Section 2 of the Sherman Act, 15 U.S.C. §2.

OPINIONS BELOW

The opinion and judgment of the District Court finding York Hospital liable for injunctive relief on account of violations of Section 2 of the Sherman Act, 15 U.S.C. §2, was entered on September 30, 1982. It is reported as *Weiss v. York Hospital,* 548 F.Supp. 1048 (M.D. Pa. 1982) and set forth in the Appendix at A-97. The opinion and judgment of the Court of Appeals reversing the District Court's finding of liability under Section 2 of the Sherman Act was entered on September 27, 1984 and is officially reported as *Weiss v. York Hospital,* 745 F.2d 786 (3d Cir. 1984). It is set forth in the Appendix at A-1.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals sought to be reviewed here was issued and entered on September 27, 1984. (A-1 - A-96) Timely petitions for rehearing were denied in orders entered by the United States Court of Appeals for the Third Circuit on October 25, 1984. (A-128 - A-129) No order was sought or granted extending the time within which the parties might file petitions for writs of certiorari, and the instant petition is filed within ninety days of the date on which the Court of Appeals denied the motions for rehearing.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

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STATUTORY PROVISION INVOLVED

The statutory provision germane to this Petition is Section 2 of the Sherman Act, 15 U.S.C. §2, which provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding One Million Dollars if a corporation, or, if a person, One Hundred Thousand Dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court."

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STATEMENT OF THE CASE

A. The Facts

Within the York Pennsylvania Medical Service Area ("York MSA")[1] there are only two providers of inpatient hospital services. One is Memorial Osteopathic Hospital, an institution whose Medical Staff has traditionally been composed of osteopathic physicians[2]. (A-9) The other is

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[1] The York MSA includes most of York County, Pennsylvania and is an area which was designated by the Pennsylvania Health Systems Agency for purposes of regulating the provision of health care in Pennsylvania. (A-5)

[2] Dorland's Illustrated Medical Dictionary defines osteopathy as:

> "A system of therapy founded by Andrew Taylor Still (1828-1917) and based on the theory that the body is

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York Hospital ("York"), an institution which is controlled and exclusively staffed by doctors who graduated from allopathic[3] medical schools. (A-9) York is a far more powerful institution with a market share exceeding eighty percent. (A-9) In addition, a number of highly technical, complex "tertiary care" services and facilities which are essential in the treatment of a wide range of medical problems are only available at York. (A-9 - A-10) Because of regulatory constraints, historical conditions, and economies of scale, these facilities cannot feasibly be duplicated by Memorial Hospital or any new entrant. (A-10)

York Hospital awards "staff privileges" by which physicians are licensed to admit and treat patients at the hospital within the parameters established by their particular delineation of privileges. (A-15 - A-16) Without such privileges a physician cannot effectively admit, follow, and treat patients at York Hospital. (A-11)

Each member of the Medical Staff at York Hospital practices in an individual capacity. (A-58 - A-59; A-61)

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capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal mechanics and manipulative methods of detecting and correcting faulty structure.

Osteopathic physicians generally signify their degree as D.O. (A-4 - A-5)

[3] Allopathy is defined as a system of remedial treatment in which it is sought to cure a disease by producing, through medicines, a condition incompatible with disease. *See, Funk & Wagnalls New Standard Dictionary of the English Language* (1942). Allopathy constitutes the common or "regular" system of medical practice. (A-5) Allopathic doctors signify their degree as "M.D." (A-5)

Each is an independent economic entity which competes with other doctors in the York medical community. (A-58 - A-59 and A-61) The members of the Medical Staff are organized into an unincorporated association (A-61), which York Hospital empowers to make all decisions concerning staff privileges. (A-15 - A-16; A-61; A-63) In effect, York gives its Medical Staff unbridled power to control access by competing groups of physicians to the Hospital's facilities.

Although separately schooled, both D.O.'s and M.D.'s are equally qualified for state licensure to practice medicine and surgery within the Commonwealth of Pennsylvania. *See:* 63 *Purdon Stat. Ann.* §271.2 *et seq.* & §421.2 *et seq.* Since at least the mid 1960's, there has been no difference in the professional training of either group. (A-5 - A-6) Both are considered to be equally competent to provide quality health care. (A-5 - A-6) Despite this, both York Hospital and the Bylaws of its Medical Staff formally barred D.O.'s from obtaining staff privileges at York Hospital until the end of 1976. (A-11) At that time, in response to legal pressure by the named plaintiff and other D.O.'s, these formal entry barriers were removed. (A-12) However, the change was purely cosmetic. Since 1976, the defendants continued their exclusionary conduct by adopting and enforcing a covert policy of discrimination against D.O.'s. (A-20; A-12; A-13; A-66; A-92)

Consequently, whenever the patient of a D.O. wanted to go to York Hospital for treatment, either because the patient preferred the reputation and size of York over Memorial or because the patient required tertiary care services that were available only at York, the treating D.O. physician had no choice but to refer the patient to an M.D. with staff privileges at York Hospital. (A-6)

Such discrimination deprived osteopathic patients of the value of their physician's continued participation in their care including his knowledge of their complaints, past medical history, course of treatment, psychological factors, family and social background and the like. It resulted in the direct loss of the fees which would have been earned by the D.O.'s had they been permitted to perform services for such patients at York Hospital. (A-11) Moreover, the York M.D.'s to whom the D.O.'s were compelled to refer their patients were free to and frequently did direct the patients not to return to the referring osteopath for further primary or secondary care but to have other M.D.'s undertake such treatment. (A-11 - A-12; A-130 - A-159) Since M.D.'s never refer to D.O.'s, this had the effect of siphoning off patients from the osteopathic community to the allopathic community. (A-130 - A-159) Thus, the exclusion of osteopathic physicians caused the diversion of patients from D.O.'s and Memorial Hospital to their respective competitors, the M.D.'s and York Hospital, both for tertiary and for less specialized care. (A-130 - A-159)

B. The Proceedings Below

On February 6, 1980, plaintiff, an osteopathic physician in the York MSA, brought suit against York Hospital and its Medical Staff in the United States District Court for the Middle District of Pennsylvania. (A-22) Among other things, the Complaint sought injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. §26, alleging that defendants' discriminatory conduct towards osteopaths was a boycott and unlawful under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2).[4] (A-22 - A-23) The case

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[4] Plaintiff moved for class certification under *Fed.R.Civ.P.* 23. Finding that the suit was primarily one for declaratory and

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was tried before a jury of twelve. (A-23) At the conclusion of the evidence, the court submitted 42 Special Verdict Questions with 122 subparts for answer by the jury. (A-22) Pursuant to defendants' request, the jury was instructed that in considering these questions, it was obliged to conclude that the York Medical Staff was acting as the Hospital's agent with respect to all staff privilege questions. After two days of deliberation, the jury returned its unanimous verdict. It found that:

1) The York Hospital Medical Staff acted to "deny or impede reasonable, fair, equal, and full access to staff privileges by osteopathic physicians" and that plaintiff would have been granted staff privileges at York Hospital but for the fact that he was an osteopathic rather than an allopathic physician (A-99);

2) The provision of inpatient hospital care services "supplied by hospitals and their medical staffs" in the York MSA was the relevant market and that York Hospital had monopoly power within that market (A-99 - A-100);

3) York Hospital exercised its monopoly power to unreasonably exclude osteopathic physicians from York Hospital (A-100); and

4) York Hospital had the specific intent to acquire monopoly power and acted in furtherance of that intent in a way which injured osteopaths in the York MSA (A-100 - A-101).

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injunctive relief and that the requirements of Rule 23(a) were satisfied, the district court certified plaintiff to proceed under Rule 23(b) (2) as the representative of a class composed of all osteopathic physicians in the York MSA.

The district court discharged the jury and received additional evidence on the propriety of injunctive relief. (A-24 - A-25) It adopted the jury's verdict as findings of fact, made additional findings, and concluded that York Hospital was shown to have violated Section 2 of the Sherman Act. (A-23 - A-25) Based upon the significant threat of injury posed by the Hospital's violations of the law and the likelihood that they would continue to recur absent equitable relief, Judge Muir entered an injunction against the Hospital in favor of the plaintiff class on September 30, 1982. (A-25 - A-26; A-90 - A-91) The defendants perfected an appeal from this injunction to the United States Court of Appeals for the Third Circuit on October 28, 1982. (A-28)

On September 27, 1984, the Third Circuit lodged its opinion in the appeal.[5] The court agreed that the Medical Staff acted as an agent of the Hospital in regard to staff privilege decisions and controlled physician access to York Hospital's facilities. (A-63) Further, the court found substantial evidence to support the determination by the jury and the lower court that York's M.D. Staff had discriminated against D.O.'s. (A-66; A-92) The court's decision also upheld the determination that the provision of inpatient care by hospitals and physicians in the York MSA was the relevant market and that York Hospital had monopoly power within that market. (A-82 - A-88) Accordingly, the court held, plaintiff had established the first

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[5] One major portion of that opinion affirmed the district court's certification of a class under *Fed.R.Civ.P.* 23(b) (2). In another important section of the opinion, the Third Circuit found that the Medical Staff had violated Section 1 of the Sherman Act. Neither of these issues is involved in the instant Petition for Certiorari.

of the two elements predicate to a finding of the offense of monopolization under Section 2 of the Sherman Act.

The Court's opinion then went on to correctly observe that the law did not forbid the possession of monopoly power alone, but rather its untoward acquisition or exercise. (A-88) Accordingly, the offense also partakes of elements of purpose or effect which the court characterized under a semantic formula as the "willful" maintenance of monopoly power. (A-88) Here, the Circuit Court found the plaintiff's case wanting. Although the issue had been raised by defendants for the first time on appeal and without citation to any authority whatsoever, the Circuit Court ruled that York's refusal to grant D.O.'s access to its unique, competitively essential facilities could not be an unlawful exercise of monopoly power because it was not directed at the Hospital's competitors, but rather at potential users in an adjacent market. (A-89 - A-90) According to the opinion, the requisite element of willfulness could not be shown under such circumstances because the Hospital had no apparent economic motive to exclude potential users such as D.O.'s and because the obvious anticompetitive motive of the Medical Staff could not be imputed to the Hospital, even though its members acted as the Hospital's agents as a matter of law. (A-90) Even if that anticompetitive animus could be imputed to the Hospital, the court reasoned:

> "The actions taken in furtherance of that motive have nothing to do with the maintenance of York's monopoly position; restricting the access of D.O.'s to York Hospital will not aid York in maintaining that power." (A-90)

Accordingly, the Third Circuit reversed the district court's judgment against York under Section 2 of the Sherman Act.

REASONS FOR GRANTING THE WRIT

A.

Our courts have long endeavored to enunciate a principled formulation which will define when the acquisition or exercise of monopoly power violates Section 2 of the Sherman Act, 15 U.S.C. § 2. Although Justice Douglas' opinion in *United States v. Grinnel Corp.*, 384 U.S. 563, 570 (1966), required proof of the "willful" acquisition or use of monopoly power, it is not necessary that one prove that a monopolist possesses a specific intent to build or maintain a monopoly.[6] Such an intent, of course, will suffice. However, the statute is considered violated by conduct which has been variously denominated as "exclusionary practices,"[7] "misue of monopoly power,"[8] and "conduct not honestly industrial,"[9] but which is most frequently described simply as "anticompetitive."[10]

The question which attracts our attention here is how these formulations translate into legal obligations on the part of a monopolist vis-a-vis those in adjacent markets. In short, when does a monopolist have a duty to deal?

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6 *United States v. Griffith*, 334 U.S. 100, 105 (1948); *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. den.*, 459 U.S. 903 (1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979); *cert. den.*, 444 U.S. 1093 (1980); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711 (7th Cir. 1977), *cert. den.*, 439 U.S. 822 (1978).

7 *United States v. Griffith*, 334 U.S. 100, 107 (1948).

8 *Id.* at 108.

9 *United States v. Aluminum Company of America*, 148 F.2d 414, 431 (2d Cir. 1945).

10 *E.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 265, 273 (2d Cir. 1979), *cert. den.*, 444 U.S. 1093 (1980).

This Court's decision in *United States v. Colgate Co.*, 250 U.S. 300 (1919), made it clear that our desire for competitive markets restrains the freedom of a monopolist to trade which is normally accorded merchants without such power. Guidance from this Court illuminating the scope of these restrictions has come from only a quintet of cases, the latest of which was decided over a decade ago.

United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) is the seminal monopoly-refusal to deal case. There, the Terminal Association was a corporation which did not compete in the sale of rail transportation. Rather, it had a reciprocal relationship with the railroads whereby it supplied terminal and switching facilities which were not easily duplicated and which were essential for the railroads to functon competitively. *Id.* at 393-400. Access to the Association and its facilities was controlled by some, but not all, of the railroads who arbitrarily denied membership in the Association to competing railroads. *Id.* Under these circumstances, this Court held that the Association was guilty of monopolistic abuse in violation of Section 2 of the Sherman Act. *Id.* at 409.

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), defendant had monopoly power in the manufacture of photographic materials and supplies. It refused to sell to Southern Photo, a competitior at the retail level where Kodak had no monopoly. This Court found that because monopolists have more narrowly circumscribed dealing prerogatives than ordinary competitors, they violate the Sherman Act if their refusal manifests an intent to monopolize. *Id.* at 375. The Court permitted the jury to infer such a purpose simply from proof of Kodak's desire to purchase Southern Photo and

the absence of business justification for its refusal to sell to Southern Photo. *Id.*

The defendant in *Associated Press Co. v. United States,* 326 U.S. 1 (1945), was an independent corporation in the business of gathering and selling news to publishers. *Id.* at 3-4. The Associated Press was not in competition with the publishers who sold news at retail. Rather, there was a complimentary relationship whereby its staff gathered news which was sold to newspaper publishers having membership contracts with the Associated Press. *Id.* Since Associated Press' revenue was dependent on the revenue provided by its members, it was against its self interest to decline membership to non-member newspapers. Nonetheless, it acquiesced in its members' desires and adopted a plan which afforded its members a qualified right to exclude their competitors from becoming members in Associated Press or from purchasing Associated Press news. *Id.* at 8-11. As a matter of law, this Court held that Associated Press violated both sections of the Sherman Act when it did so. *Id.* at p. 15.

In *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951), the defendant was a newspaper which had a monopoly over the sale of advertising. *Id.* at 147. When a radio station opened in a nearby town, the newspaper refused to sell advertising to any business which purchased advertising from the radio station. *Id.* at 148. This Court sustained the lower court's power to infer that the defendant's refusal sell was a policy deliberately instituted to damage the radio station. Based on this inference, the court found the refusal to deal was an unlawful use of monopoly power. *Id.* at 148-49.

The final case in the quintet of cases demarcating the monopolist's "duty to deal" is the decision in *Otter-Tail Power Co. v. United States*, 410 U.S. 366 (1973), which involved a vertically integrated power company which generated, wholesaled, and retailed electric power in three midwestern states and controlled the subtransmission lines which were essential to the distribution of electrical power. *Id.* at 370. Otter-Tail refused to "wheel" power over these subtransmission lines to municipalities who sought to sell power at the retail level of distribution. *Id.* at 380-381. In so doing, this Court observed, "Otter-Tail used its power in the towns in its service area to foreclose competition or gain a competitive advantage." *Id.* at 377. This, the court held, was a violation of Section 2 of the Sherman Act.[11]

Courts and commentators have characterized these cases as creating two separate tests to measure the law-

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[11] Although not decided by this Court, another seminal decision in the area is Judge Clark's opinion for the court in *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir. 1952). There, the principal defendant was an independent corporation which owned a building used as a central marketplace by the local produce vendors, some of whom controlled the corporation. As a lessor of building space to the produce distributors, the corporation was not in competition with the distributors and had an economic interest in dealing with them. However, the corporation permitted wholesalers in the market to exclude another wholesaler from obtaining a lease to use its facilities. This, held the court, was monopolization as a matter of law:

> "The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of purpose to monopolize." *Id.* at 488.

fulness of vertical exertions of market power.[12] The first is described as the "subjective" or "intent" test. Under this test, it is not necessary that the defendant act for the purpose of obtaining or maintaining a monopoly.[13] Rather, by example of the *Kodak* case, the test is satisfied by proof that a monopolist refused to deal for the purpose of foreclosing competition or gaining a competitive advantage either in the monopolized market or in an adjacent one.[14] Such an intent may be inferred from the circumstances surrounding the refusal to deal.[15]

Although it is possible to read each of these cases as an example of this intent formulation, the courts and com-

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12 *Mid-Texas Communications Systems, Inc. v. A T & T*, 615 F.2d 1372, 1387-88 n. 12 (5th Cir. 1980) (describing theories as "subjective" and "objective"), *cert. den.*, 449 U.S. 912 (1980); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855-56 (6th Cir. 1979) (describing theories as "intent" test and "bottleneck" theory). *See generally:* Comment, "Unclogging the Bottleneck, A New Essential Facilities Doctrine," *83 Columbia L.Rev.* 441, 443-46 (1983); Comment, "The Monopolist's Refusal to Deal: An Argument for a Rule of Reason," *59 Tex. L.Rev.* 1107, 1119-26 (1983); Note, "Refusal to Deal by Vertically Integrated Monopolists," *87 Harv. L.Rev. 1720* (1974).

13 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275-76 (2d Cir. 1979), *cert. den.*, 444 U.S. 1093 (1980); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977); *cert. den.*, 439 U.S. 822 (1978). *See, United States v. Griffith*, 334 U.S. 100, 107 (1948); *United States v. Aluminum Company of America*, 148 F.2d 416, 438 (2d Cir. 1945).

14 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. den.*, 444 U.S. 1093 (1980); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711-13 (7th Cir. 1977), *cert. den.*, 439 U.S. 822 (1978); *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 482-83 (5th Cir. 1960); *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3d Cir. 1958).

15 *See, Lorain Journal Co. v. United States*, 342 U.S. 143, 148-49 (1951); and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927).

mentators have gone on to devine a test which looks, in large measure, to the effect of a monopolistic refusal to trade. First labeled as the "bottleneck theory" by A.D. Neale and later denominated the "essential facilities doctrine," this rule follows *Terminal Railroad, Associated Press, Otter-Tail,* and *Gamco.*[16] Broadly stated, it holds that those in control of essential facilities which are difficult to duplicate may not deny access to those facilities to firms in an adjacent market without reasonable business justification.[17]

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[16] A.D. Neale stated the following rule:

> "The Sherman Act requires that where facilities cannot practically be duplicated by would be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose a scarce facility."

A.D. Neale, *The Antitrust Laws of the United States,* 66-70, 127-33 (2d Ed. 1970). Professor Sullivan's articulation of the essential facilities doctrine is one which is frequently quoted alongside of Neale's. He states the rule as follows:

> "[I]f a group of competitors, acting in concert, operate a common facility and if, due to natural advantage, custom, or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable non-discriminatory terms."

L. Sullivan, *Handbook of the Law of Antitrust,* § 48 at 31 (1977 ed.). *See also: MCI Communications, Inc. v. A T & T,* 708 F.2d 1081, 1132-33 (5th Cir. 1983), *cert. den.,* — U.S. —, 104 S.Ct. 234 (1983); *Byars v. Bluff City News Co., Inc.,* 609 F.2d 843, 856 (6th Cir. 1979); *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. den.,* 436 U.S. 956 (1978); Watson & Bronner, "Monopolization by Regulated Monopolies, The Search for Substantive Standards," 22 *Antitrust Bulletin* 559, 571 (1977).

[17] *Id.*

B.

The last six years have seen a proliferation of the number of cases bottomed on an essential facilities theory of monopolization.[18] These cases have generated a legal quagmire of difficult and conflicting judgments which necessitate review of the area by this Court.[19] The Court took one step in that direction by granting certiorari in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, [1984] *Trade Cases*, ¶ 66,101 (10th Cir.), *cert. granted*, — U.S. — (1984), to consider the extent to which the essential facilities doctrine requires a monopolist to cooperate with a competitor in the monopolized market—an issue as to which no disagreement had yet appeared in the circuit courts. Another and more urgent step is dearly needed to resolve the issues raised here.

The questions of whether and to what extent an element of "horizontality" is required to demonstrate that a monopolist's refusal to deal is unlawful under the essential facilities doctrine has generated pronounced disagreements among the circuit courts of appeal. On these questions, there is agreement on only one thing—that the law is "unclear," "confused" and "conflicting."[20] It varies

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18 See: Comment, "Unclogging the Bottleneck, A New Essential Facilities Doctrine," 83 *Columbia L.Rev.* 441, 447-48 (1983).

19 *See generally:* Comment, "Unclogging the Bottleneck, A New Essential Facilities Doctrine," 83 *Columbia L.Rev.* 441, 447-48 (1983); Comment, "The Monopolist's Refusal to Deal: An Argument for a Rule of Reason," 59 *Tex. L.Rev.* 1107 (1983).

20 See, *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 928 (2d Cir. 1980) ("unclear"), *cert. den.*, 450 U.S. 917 (1981); *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 859-60 (6th Cir. 1979); Comment, "Unclogging the Bottleneck, A New Essential Facilities Doctrine," 83 *Columbia L.Rev.*, 441 446 & 452 (1983) (courts are "plagued by confusion").

among the eight circuits which have considered it so that the lawfulness of a given practice will depend on the plaintiff's choice of forum rather than the uniform application of a law which purports to regulate commerce among all the states. Indeed, the confusion is so significant that there are unresolved conflicts within some of the same judicial circuits, thereby rendering the law within those jurisdictions thoroughly unintelligible.

Specifically, the District of Columbia Circuit[21], the Sixth Circuit[22], the First Circuit[23], and one decision in the Fifth Circuit[24] have held that the essential facilities doctrine may be invoked to impose a duty of dealing on a single monopolist in control of an essential facility. In contrast, a decision of the Fifth Circuit requires that a combination of competitors control access to the essential facility before making the doctrine available to remedy the market foreclosure caused by a refusal to deal.[25]

Decisions in the Second Circuit[26], Sixth Circuit [27], Fourth Circuit [28], and with this case, now the Third Cir-

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21 *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. den.*, 436 U.S. 956 (1978).

22 *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979).

23 *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982), *cert. den.*, 459 U.S. 903 (1983).

24 *LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966).

25 *Fulton v. Hecht*, 580 F.2d 1243, 1248 (5th Cir. 1978).

26 *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. den.*, 450 U.S. 917 (1981).

27 *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942 (6th Cir. 1983).

28 *Shapiro v. General Motors, Inc.*, 472 F.Supp. 636, 644 (D. Md. 1979), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. den.*, 451 U.S. 909 (1981).

cuit, hold that the duty to trade on the part of those in control of unique, competitively important facilities is dependent on whether or not they compete with the firm seeking access to the facility. These cases refuse to find Section 2 violated by a refusal to deal with a non-competitor regardless of the impact of such a refusal on the market. Although the rationale for this approach is elusive, it appears to be based on the assumption that in order for a monopolist's behavior to be judged unlawful its effect must be to advance the monopolist's power in some market. Since a refusal to deal with a non-competitor cannot advantage a monopolist, they reason that it cannot be unlawful.

In contrast, decisions in the Sixth[29], District of Columbia[30], First[31], and Fifth[32] Circuits hold that a monopolist can be legally responsible for the unreasonably anticompetitive effects flowing from a refusal to deal irrespective of whether that refusal is directed at the monopolist's competitors. These Courts reason that since the antitrust laws are aimed at the preservation of competition, the lawfulness of a monopolist's conduct must be measured by the extent to which his conduct unreasonably affects competition. Whether the monopolist, by vertical integration or otherwise, operates in a market adjacent to the essential facility in competition with those foreclosed

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29 *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979).

30 *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. den.*, 436 U.S. 912 (1978).

31 *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982), *cert. den.*, 459 U.S. 903 (1983).

32 *LaPeyre v. FTC*, 366 F.2d 117 (5th Cir. 1966).

by its refusal to deal is irrelevant to the effect of that refusal. Thus, by this reasoning, it is immaterial to proper antitrust analysis.

This dichotomy of decision presents an important federal question as to what we, as a nation, seek to value and protect in our antitrust policy as regards monopolies. One side in the chasm of authority on point would suggest that we are concerned only with activities which enhance an existing monopoly or create a new one. Yet, following the teachings of this Court, these cases have recognized that the concern of Section 2 is a broader one protecting against activities by monopolists which, while they do not create or preserve monopoly power, give the monopolist an advantage in an adjacent market.[33] Is our concern, then, simply confined to whether a monopolist uses his power in one market to gain an advantage in another or does it embrace all of the unreasonably anticompetitive effects caused by the vertical exertion of monopoly power. This question has not been directly addressed by this Court. Both the appellate Courts and the commentators have called for "guidance from above" to resolve the confusion created by that silence.[34]

The Third Circuit's opinion characterizes the case at bar as one in which a single firm monopolist, the Hospital, refused to deal with potential users in an adjacent market with whom it did not compete, the osteopathic physicians. According to the Court of Appeals, this refusal was not

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[33] See authorities cited at footnotes 14, 26, 27, and 28, *supra*.

[34] See *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920, 928 (2d Cir. 1980) ("guidance from above"), *cert. den.*, 450 U.S. 917 (1981). *See also*, Comment, "Unclogging the Bottleneck, A New Essential Facilities Doctrine," 83 *Columbia L.Rev.* 441, 446 & 452 (1983).

aimed at the Hospital's competitors and did not advantage it. However, in the Court's view, the refusal unreasonably restrained trade in the adjacent marketplace of physicians. By ruling that the Hospital's boycott of osteopathic physicians was not actionable because the Hospital was not in competition with the physicians, the Circuit Court presented this Court with a sharply drawn opportunity to afford the guidance which all agree is necessary to resolve the present division of authority regarding "purely vertical" refusals by monopolists to deal.

C.

The impact of the Third Circuit's decision in this case is far more profound than the alignment of another circuit in the growing division of authority on an important issue of antitrust law. The court's characterization of York Hospital as a single firm monopolist represents a fundamental redefinition of the circumstances under which monopoly power is deemed to be exercised horizontally and thus embraces a rejection of the basic theoretical notions which lie at the heart of our understanding of exclusionary behavior under Section 2.

The Third Circuit's opinion holds that although the Hospital delegated control over access to its unique facilities to the physicians on its Medical Staff (A-63 & A-15), and although these physicians acted with intent to disadvantage their D.O. competitiors by denying them important hospital services and facilities (A-66; A-92), an abuse of the Hospital's monopoly power could not be established under an intent or effect theory for two reasons. First, the M.D. physicians' anticompetitive intent could not be imputed to the Hospital because their actions

in excluding D.O.'s could not benefit the Hospital. (A-90) Second, even if that premise failed, the Staff's conduct could not be shown to "aid York in maintaining" its monopoly position in the adjacent market. (A-90)

Just recently in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, — U.S. —, 102 S.Ct. 1935 (1982), this Court ruled that for purposes of the antitrust laws the acts of an agent within the scope of his apparent authority must be imputed to the principal regardless of whether they benefit the principal. In reaching this conclusion, the court reasoned that:

> "Whether they intend to benefit [defendant] or not, [defendant's] agents exercise economic power because they act with the force of the [defendant's] reputation behind them. And, whether they act in part to benefit [defendant] or solely to benefit themselves or their employers, [defendant's] agents can have the same anticompetitive effects on the marketplace. The anticompetitive practices of [defendant's] agents are repugnant to the antitrust laws even if the agents act without any intent to aid [defendant], and [defendant] should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in [defendant] solely for their own benefit or the benefit of their employers."

Id., 102 S.Ct. at 1946.

Here, the Third Circuit expressly ruled that in discriminating against D.O.'s, York's Medical Staff acted anticompetitively as an agent of the Hospital. (A-63) The application of *Hydrolevel's* principle to this conclusion compels a contrary result to that reached by the Circuit Court here. The anticompetitive animnus of the Hedical Staff should have been imputed to the Hospital. The

Court of Appeals cited no reason or authority to the contrary, and we have been able to dscover none.

In regard to the second point made by the Court of Appeals, the circuits have uniformly interpreted this Court's *Eastman Kodak* and *Terminal Railroad* decisions as establishing the principle that a finding of monopolization does not depend on whether the monopolist acts to maintain his monopoly position or to establish a monopoly in a related market.[35] This is not necessary. Rather, the cases consistently find that abuse is made out by showing that monopoly power in one market has been used to unreasonably restrain competition or to gain an advantage in an adjacent market.[36]

As we have seen, there is some division of authority on whether to apply this principle to impose a duty to deal with a non-competitor of a single firm monopolist in an adjacent market.[37] However, apart from the present case, no case has declined to find such an obligation where firms competing in a market adjacent to a monopolized market control access to the essential facilities of the monopolist. To the contrary, the plain import of *Terminal Railroad, A.P., Gamco,* and their progeny[38] is that where there is an essential interdependence between two markets, monopoly power extant in one market is necessarily shared in the adjacent market with those who are permitted to control

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35 See footnotes 13-14, and accompanying text, *supra*.

36 *Id.*

37 See footnotes 21-25, and accompanying text, *supra*.

38 See footnotes 16 & 21-32, and accompanying text, *supra*.

access to the monopolized facilities. Such control requires the court to treat the adjacent markets as a single one. In other words, if a monopolistic refusal to deal occurs at the behest of a group of competitors in an adjacent market, the essential facilities doctrine views that refusal as a horizontal exertion of monopoly power in the adjacent market. So viewed, the unjustified use of that power to exclude competitors from access to the monopolist's essential facilities amounts to an unlawful exclusionary exercise of the monopoly power shared by the group.

Without citing any reason or authority, the circuit court's opinion sweeps these principles aside. It thus represents a radical change in the way we view market structure and legal responsibility for the purposes of Section 2 of the Sherman Act. Where a monopolist permits a dominant group of firms in a related market which is dependent on the monopolist's facilities to control access to those facilities, is it economically sound to completely splinter the two markets and view the exercise of such control as a purely vertical exertion of monopoly power to exclude competition? When a monopolist knowingly permits its power to be employed by others to gain unreasonable competitive leverage, is it legally prudent and socially wise to permit the monopolist to escape all legal responsibility for that behavior simply because he does not compete at the level of competition which is impaired. These are issues of overwhelming national importance which, though once settled, have now been placed in question. They are thus deserving of attention by this Court.

D.

The circuit court's opinion goes on with a further and final departure from the precedents of this Court which, if permitted to stand, will all but eliminate the vertical exercise of monopoly power as a subject of antitrust concern.

As manifest by this Court's decision in *Lorain Journal*, it has always been well understood that an unlawful intent to adversely affect a monopolist's competitors could be inferred from the circumstances surround a purely vertical refusal to deal.[39] Even those cases which limit the use of the essential facilities doctrine recognize as much.[40]

Here, the jury viewed the evidence as showing that York Hospital acted to exclude D.O.'s from its Medical Staff with the specific purpose of effecting its own competitor, Memorial Hospital. (A-100 - A-101) That finding was supported by substantial evidence. If the D.O.'s did not achieve staff privileges at York Hospital, York Hospital and its M.D.'s could use their power over the unique and highly specialized services which they offered as a means of siphoning patients away from Memorial Hospital for fu-

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39 See footnotes 14-15, and accompanying text, *supra*.

40 See: *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 925-26 (2d Cir. 1980), *cert. den.*, 450 U.S. 917 (1981); *Shapiro v. General Motors Corp.*, 472 F.Supp. 636, 644-45 (D. Md. 1979), *aff'd*, 636 F.2d 1214 (4th Cir. 1980), *cert. den.*, 451 U.S. 909 (1981); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 712 (7th Cir. 1977), *cert. den.*, 439 U.S. 822 (1978). *See also: Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855-56 (6th Cir. 1979); J. VonKalinowski, *Antitrust Laws & Trade Regulations*, § 8.02(4) at 8-61 - 8-62, n. 146 (1982).

ture use of the less specialized services offered by both hospitals. In contrast, if D.O.'s were allowed to continue to care for their patients when circumstances required that they be hospitalized at York they would be free to retain their patients at the conclusion of the York hospitalization and refer them to Memorial for future care. Thus, permitting D.O.'s to participate in their patients' specialized care when it was required at York Hospital would serve to prevent the steady diversion of patients from York's only competitor and strengthen competition in the hospital market.[41]

Despite this evidence, the Third Circuit rejected the jury's finding of monopolistic intent and the trial court's concomitant conclusion of monopolization. It did so only because the plaintiff class did not compete with York Hospital. (A-89) This ruling is irreconcilably at odds with *Lorain Journal* and the appellate cases on point. It literally changes the entire approach which has been taken to scrutinize the use of monopoly power.

Exclusionary intent has always been a principal touchstone in the ascertainment of monopolistic abuse.[42] The imposition of a rule which automatically precludes a finding of such intent based on the competitive relationship of the parties is a mechanical evidentiary invention which bears no relation to the truth-finding function. So long as intent remains relevant in Section 2 analysis, such an artificial barrier should not be imposed. If the role of intent and the rules by which it is ascertained are to be altered, it is for this Court to do so.

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41 See A-130 - A-159.

42 See footnotes 12-15, and accompanying text, *supra*.

E.

Since the turn of the century, our nation has viewed monopolies as odious enterprises which sapped the wealth of the nation, stunted its growth, and stifled the incentive to productive imagination created by our capitalist economy.[43] Where they have been tolerated, it was only because they resulted from natural advantage or superior business acumen, not otherwise inimical to the national interest in open markets.[44] Where they have been accompanied by actions rooted in anticompetitive motive or foreshadowing unduly exclusionary effects, they have been subject to the injunction of the antitrust laws. This Court has endeavored to develop evidentiary and substantive rules to ascertain such motives and to measure such effects. In an extension of one side of an already intolerable division among the circuits, the decision of the Third Circuit here represents a complete repudiation of that endeavor.

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43 *E.g., United States v. Aluminum Company of America,* 148 F.2d 416, 427 (2d Cir. 1945). Consumers in a monopolized market will buy fewer goods at a higher price than they would in a competitive market. *See,* P. Samuelson, *Economics,* 476 (8th ed. 1970); F. Scherer, *Industrial Market and Economic Performance* at 9-44 (2 ed. 1980). The monopolist's market control enables it to increase its profit at the consumer's expense, and promotes inefficiency by forcing consumers who could have purchased the monopolist's product at competitive prices to forego that product in favor of a lower priced alternative and actually consumes more of society's productive resources. P. Samuelson, *Economics, supra,* at 479-80.

44 *United States v. Aluminum Company of America,* 148 F.2d 416, 430 (2d Cir. 1945); *United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966).

At heart, the opinion replaces the role of purpose and effect in the legal assessment of monopolistic exclusionary behavior with a rule which mechanically allocates the legal consequences of such conduct according to whether or not it was directed at a monopolist's competitors. Such a formulation is artificial and has nothing to do with the purposes of the antitrust laws. This Court has repeatedly cautioned that the purpose of those laws is not to protect competitors, but rather to protect competition.[45] This is not an empty formulation, but a vital and guiding principle. Behavior can have anticompetitive consequences regardless of whether it is directed at a competitor, supplier, or customer.[46] Preventing such untoward consequences is the primary concern of the antitrust laws. Thus, this Court has repeatedly taken review of appellate decisions which limit antitrust enforcement to activities which affect only the defendant's competitors, even where there was no division yet manifest in the courts of appeal.[47] We respectfully submit that this too is a case deserving of such review.

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[45] *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 686-92 (1972); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

[46] *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

[47] *E.g., Blue Shield of Virginia v. McCready*, — U.S. —, 102 S.Ct. 2540 (1982).

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit entered on September 27, 1984 insofar as it reversed the judgment of the district court holding that defendant, York Hospital, violated Section 2 of the Sherman Act.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 82-3507, 82-3580 & 82-3581

MALCOLM WEISS,

Appellee in Nos. 82-3507 & 82-3580
Cross-Appellant in No. 82-3581

v.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D.; HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., S.W. DEISHER, M.D., (Executive Committee - JACK A. KLINE, M.D., LOIS M. KUSHNER, IVAN L. BUTLER, M.D., GARY ARDISON M.D., and THOMAS L. BAUER, M.D.,

Appellants in Nos. 82-3507 & 82-3580
Cross-Appellees in No. 82-3581

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 80-134)

Argued November 15, 1983

Before: ADAMS* and BECKER, *Circuit Judges*,
and VAN DUSEN, *Senior Circuit Judge*

(Filed September 27, 1984)

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* After the oral argument Judge Adams recused and did not participate in the resolution of this appeal.

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

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I. *INTRODUCTION AND GENERAL BACKGROUND*

This antitrust case arises from the refusal to grant hospital staff privileges to a physician. The plaintiff, Malcom Weiss, is an osteopath[1] who was denied staff

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1. Dorland's Illustrated Medical Dictionary defines Osteopathy as:

> a system of therapy founded by Andrew Taylor Still (1828-1917) and based on the theory that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal body mechanics and manipulative

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privileges at York (Pennsylvania) Hospital. Dr. Weiss brought this suit, both individually and as representative of the class of all osteopathic physicians in the York Medical Service Area (York MSA),[2] against York Hospital ("York"), the York Medical and Dental Staff, and ten individual physicians who served on the York Medical Staff Executive Committee and the York Judicial Review Committee. York is controlled by, and, at the time Dr. Weiss applied for staff privileges, was exclusively staffed by doctors who graduated from allopathic medical schools.[3]

The gravamen of Weiss' lawsuit is that, although allopaths (hereinafter referred to as medical doctors or M.D.s) and osteopaths (D.O.s) are equally trained and qualified to practice medicine,[4] his application for staff privileges at York hospital was turned down solely because of his status as an osteopath. Generally, a

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methods of detecting and correcting faulty structure.

Osteopathic physicians signify their degree as D.O.

2. The York MSA is the area surrounding York Hospital and includes most of York County, Pennsylvania. The area was designated by the Pennsylvania Health Systems Agency as part of that state agency's system of regulation of the provision of health care in Pennsylvania. For purposes of this case the York MSA was found by the jury to be the relevant geographic area within which to measure York Hospital's economic power.

3. Allopathy is defined as a system of remedial treatment in which it is sought to cure a disease by producing, through medicines, a condition incompatible with the disease. *See* Funk & Wagnalls New Standard Dictionary of the English Language (1942). Allopathy constitutes the common or "regular" system of medical practice. Allopathic doctors, signify their degree as M.D.

4. At trial Dr. Merle S. Bacastow, an M.D. and the Vice-President of Medical Affairs at York, testified that at least since the mid-1960's there has been no difference in terms of medical training and ability to provide medical care between graduates of osteopathic medical schools and

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physician can admit and treat patients only at hospitals where he has staff privileges. If a patient desires to receive medical treatment at a hospital for which that patient's doctor does not have staff privileges (either because the patient prefers the reputation of that hospital or because that hospital is the only available hospital with equipment that is necessary for the patient's treatment) then the patient's doctor will have to refer the patient to another physician who has staff privileges at the hospital in question. *See Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982) (finding of fact, No. 32-34).

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graduates of allopathic medical schools. App. at 3806a-3809a & 4014a-4015a. This observation is born out by the fact that osteopaths and allopaths are equally qualified for state licensure to practice medicine and surgery within the Commonwealth of Pennsylvania. *Compare* Pa. Stat. Ann. tit. 63, § 271.1 *et. seq.* (Purdon 1984) ("Osteopathic Medical Practice Act") *with* Pa. Stat. Ann. tit. 63, § 421.1 *et. seq.* (Purdon 1984) ("Medical Practice Act of 1974"). *See also* Blackstone, *The A.M.A. and The Osteopaths: A Study of the Power of Organized Medicine*, 22 Antitrust Bulletin 405, 408-14 (1977). Professor Blackstone concludes that in general D.O.s receive somewhat shorter, less expensive, and less specialized training than today's highly specialized M.D.s. *Id.* at 408-10. He states that this difference may justify limitations on the privileges of osteopaths that are similar to limitations imposed upon general practice M.D.s and family practitioners, but that it would not seem to justify the total exclusion of osteopaths. *See id.* at 411; Kissam, Webber, Bigers, and Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 641 n.218 (1982) [hereinafter cited as *Antitrust and Hospital Privileges*]; Dolan & Ralston, *Hospital Admitting Privileges and the Sherman Act*, 18 Houston L. Rev. 707, 728 (1981)("Osteopaths undergo training regimens quite similar to that of M.D. practitioners, except that greater emphasis is placed on family practice and on some manipulative practices. Regardless of the situation thirty years ago, it is highly unlikely that any significant qualitative difference between the two groups exists today.").

As the result of such a referral the first doctor loses the opportunity to treat (and therefore to charge) the patient.

In addition, Weiss alleged that the treatment that he received at the hands of the M.D.s who control York sent a message to other D.O.s in the York MSA not to apply for staff privileges at York. In Weiss' submission, this scheme to exclude D.O.s from York Hospital was motivated by a desire to restrict the ability of D.O.s to compete with M.D.s, thereby increasing the profits of the M.D.s. Weiss contends that this conduct violates sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2, and state law (tortious interference with contractual relations).

The district court bifurcated the trial. The liability phase commenced on August 11, 1982, and on September 1, 1982, the jury returned unanimous answers to 42 special verdict questions. The district court molded the jury's responses into findings of liability in favor of the class (but not Weiss) and against the medical staff on the section 1 claim; in favor of Weiss and the class and against the hospital on the section 2 claim; and in favor of Weiss and against the hospital and four of the individually named defendants on the state law claims. All other defendants were exonerated on all other claims. Adopting the jury's findings of fact (by which it considered itself bound), the district court thereupon entered a final injunction against the hospital and the medical staff pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, essentially prohibiting them from future discrimination against osteopaths. In addition, the district court scheduled a second trial to determine damages based on plaintiffs' claim for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, ordered that all class members be notified of their right to apply for damages. Prior to commencement of that trial, defendants and plaintiffs brought these appeals.

The case raises a number of complicated legal questions. Our opinion is divided into five parts. Part I is this introduction and general background. In part II we detail the facts. Part III discusses a number of preliminary issues, including the extent of our appellate jurisdiction over the questions presented by the appeals, the propriety of the class certification, and the proper vicinage for the jury trial in this case. We hold that we have no appellate jurisdiction to review the defendants' challenges to the district court's findings of liability under section 1 and 2 of the Sherman Act to the extent that those findings relate solely to plaintiffs' claims for treble damages under section 4 because there is no final judgment as to these claims, and no exception to the final judgment rule applies. We reach the same conclusion with respect to the state law claims. We thus limit this opinion to a review of questions raised by the district court's issuance of an injunction under section 16 and its exoneration of some of the defendants on some of plaintiff's claims. We also hold that the class certification was proper and that the trial was held in an appropriate location.

In part IV we turn to the heart of this appeal: a review of the findings of liability under sections one and two of the Sherman Act against the hospital and the medical staff, and the consequent issuance of an injunction under section 16 of the Clayton Act. We affirm the court's issuance of an injunction against the medical staff for violating section 1, an injunction that also benefits Weiss. However, we reverse the district court's grant of an injunction against the hospital for violating section 2 because we believe that that plaintiff has failed to adduce sufficient evidence to enable him to carry his burden of demonstrating that the hospital engaged in any willful behavior designed to acquire or maintain its monopoly power. Because of a problem with the jury charge we grant a partial new trial on the question of Weiss' professional competence and

character, a factor relevant to the defendants' defenses to Weiss' section 1 damage claims. In addition, we affirm, as supported by the evidence, the district court's exoneration of various defendants on various claims. We then review the scope of the injunction issued by the district court and conclude that, given our substantive decisions on the questions of liability under sections 1 and 2, the district court should be given the opportunity to re-consider the appropriate scope of injunctive relief in the first instance. Part V contains a summary of our conclusions.

II. *THE FACTS*[5]

A. *Hospital Services in the York MSA*

There are two providers of in-patient hospital services in the York MSA: York, which is run by M.D.s, and Memorial Hospital ("Memorial"), which is run by D.O.s. York is by far the larger of the two, with approximately 450 beds and 2,500 employees. Memorial has 160 beds.[6] The testimony at trial established that York had a market share of 80% of the patient-days of hospitalization in the York MSA.

In addition to York's overall market dominance, testimony at trial established that certain complex, highly technical "tertiary care"[7] services and facilities

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5. The facts set forth below were culled from the evidence presented to the jury.

6. The record does not reveal how many employees Memorial has.

7. "Tertiary care" is a term used by the parties in this litigation to signify highly specialized "third level" hospital care. Testimony at trial indicated that there are three "levels" of hospital care. The first or primary level involves "the relationship between patient and physician usually in an outpatient setting." The second level usually involves "the application of a specialist, an internist in a hospital setting." The third or tertiary level is the "most sophisticated type of care involving intensive care and the use of subspecialists." App. at 5133a-38a.

are, for a number of reasons, only available at York.[8] Included among the services offered only at York are therapeutic radiology, open heart surgery, cardiac catheterization, renal dialysis, neo-natal intensive care, short-term acute psychiatric care, monitored stroke treatment, audiology, burn care, cardiopulmonary laboratory, cardiopulmonary rehabilitation, electroencephalography, genetic counseling, prosthetic service, speech therapy, computerized axial tomography (CAT scan),[9] and infusion aspirator.

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8. There appear to be two major reasons why Memorial does not offer tertiary care services and facilities. The first reason relates to the availability of the necessary equipment. State and federal regulations require a hospital to first obtain a "certificate of need" before purchasing expensive equipment. These certificates will not be issued when another hospital in the same service area already has the equipment and that other hospital can handle the total patient demand for that service in that area. Note, *Health Professionals' Access to Hospitals: A Retrospective and Prospective Analysis*, 34 Vanderbilt L. Rev. 1161, 1183-84 (1981); Blumstein & Sloan, *Redefining Government's Role in Health Care: Is a Dose of Competition What the Doctor Should Order?*, 34 Vanderbilt L. Rev. 849, 920-924 (1981); Blumstein & Calvani, *State Action As A Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 Duke L.J. 389, 435-437 (1978). Since most tertiary care equipment is highly sophisticated and thus very expensive, and since York already possesses the equipment and can handle the total patient demand for the York MSA, Memorial cannot obtain the required "certificates of need" to purchase tertiary care equipment for itself. The second reason is medical training. Tertiary care is only provided by highly specialized physicians. Because most D.O.s do not highly specialize, *see* Blackstone, *supra* note 4, at 407 & 427, there are few who are qualified to provide tertiary care services. By contrast, M.D.s tend to highly specialize, even outside large metropolitan areas, *id.*, hence an M.D. hospital like York is a natural place for providing tertiary care services.

9. Apparently Memorial acquired a CAT scan during the course of this litigation.

B. *Discrimination Against D.O.s at York*

Prior to 1974, both York hospital's corporate charter and the bylaws of the York medical staff barred D.O.s from obtaining staff privileges at York. "Without staff privileges, a physician cannot admit, effectively follow, or treat patients at York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 32). Consequently, whenever a patient of a D.O. wanted to go to York for treatment, either because the patient preferred the reputation and size of York over Memorial, or because the patient required tertiary care services that were available only at York, the treating D.O. had no choice but to refer the patient to an M.D. with staff privileges at York. *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 33).

The evidence adduced at trial indicated several ways in which D.O.s were economically disadvantaged as a result of this discrimination. First, D.O.s lost fees directly when one of their patients was admitted for treatment at York. Obviously, if the patient required treatment that the D.O. was qualified to provide but could perform only at York, the D.O. lost the fees that would ordinarily be charged for those services. Moreover, even if the patient required services that the D.O. was not qualified to provide, the D.O. lost the fees for those non-specialized services provided to patients both before and after the specialized care that he was qualified to perform but which had to be performed in York Hospital by an M.D. It is primarily the loss of these latter fees, derived from monitoring a patient who is receiving tertiary care from a specialist, that economically disadvantaged general practice D.O.s, who were forced to refer patients needing tertiary care to a general practice M.D. with staff privileges at York.

D.O.s were also indirectly disadvantaged as the result of York's discriminatory policy. When patients of D.O.s were referred to M.D.s in order that they could be treated at York, they sometimes did not return to the referring D.O. after the treatment at York was

completed, but instead remained in the care of the referred M.D. *See Weiss*, 548 F. Supp. at 1053 (finding of fact No. 35). Thus the referring D.O. lost the patient not just for purposes of the immediate treatment at York, but for purposes of subsequent medical care which the D.O. was qualified to provide.[10] Additionally, the evidence established that the absence of staff privileges is a competitive disadvantage, in that it indicates to patients that the doctor is a second-class practioner. *See Weiss*, 548 F. Supp. at 1052-53 (findings of fact Nos. 29 & 35).[11] Both of these factors placed D.O.'s at a competitive disadvantage vis-a-vis M.D.s in obtaining and retaining patients.

In 1974 York amended its corporate charter to allow osteopathic physicians to practice at York. Osteopaths were still barred from admission to York, however, because of the prohibition in the medical staff bylaws. Nevertheless, in early 1976, Weiss and another osteopath named Dr. Michael Zittle, both of whom were engaged in family practice in the York MSA, applied for staff privileges at York. Dr. Weiss informed representatives of the York medical staff that if York excluded him because of his osteopathic training he would institute legal action.

The York medical staff considered the applications and Weiss' threat of legal action, and in November of 1976 amended its bylaws to permit admission of osteopaths at York. Dr. Weiss' contends that the amendment of the bylaws was purely cosmetic, and that since 1976 the York medical staff has engaged in a deliberate covert policy of discrimination against osteopaths. In support of this contention Weiss offered evidence that York had a historical presumption in favor of admitting any M.D. who applied for staff

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10. *See generally* Dolan & Ralston, *supra* note 4, at 713-714.

11. *See also* Dolan & Ralston, *supra* note 4, at 714.

privileges, regardless of the applicant's medical ability or social graces,[12] but that in the case of D.O. applicants York engaged in "strict scrutiny" of the applicant's medical qualifications, and, in addition, considered the applicant's social acceptability. If the D.O. was found lacking, even minimally, in either area, his application was denied. Finally, Weiss adduced evidence that in the evaluation process for D.O.'s (but not M.D.'s), York relied on hearsay as grounds for rejecting an application for staff privileges. Because "[t]he denial of hospital staff privileges to a physician or the revocation of such privileges is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician," *Weiss*,

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12. In the ten years proceding the date of the trial, York and its staff received approximately 200 applications by M.D.s. During this period the only M.D. to ever be denied privileges was suffering from psychiatric problems. The presumption enjoyed by M.D.s was even strong enough to permit the admission to staff privileges at York of a certain Dr. "A" [actual name held confidential by the district court] even after the following report was made to the medical staff by one of its senior members based on extensive personal evaluation:

> [Dr. A] has demonstrated poor judgment in decisions about therapy without obtaining all the facts at hand or necessary to make these judgments or decisions. Moreover he has proceeded in an over-confident manner such as administration of hydrochloric acid . . . to correct metabolic alkalosis where other modes of therapy were indicated. I have discussed these actions with him but they tend to recur. He answers questions about events and dates on patients without knowing the facts. He is not able to provide total patient care. He has serious deficiencies in medical knowledge. And moreover compounds these deficiencies by neglecting to obtain the facts before treatment of patients.

548 F. Supp. at 1052 (finding of fact No. 29), the district court found that application of the strict scrutiny standard to Weiss' application for staff privileges, and the consequent denial of Weiss' application, "could reasonably be anticipated to cause [other] osteopathic physicians to refrain from applying for staff privileges at York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 31).[13]

In addition to discriminating against D.O.s in the admissions process, Weiss also offered evidence that York automatically gave any D.O. who survived the strict scrutiny of that process the lowest category of staff privileges offered by York, that of "Assistant Staff," regardless of the D.O.'s actual skill level. Under the Assistant Staff category of privileges the physician is required to consult with other members of the department in the care and treatment of his patients. By contrast, M.D.s who applied for and received staff privileges at York were given different levels of staff

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13. Since the time of Weiss' application for staff privileges, six other D.O.s have applied to York. Of those six, five were accepted and one application is dormant awaiting supplementation by the applicant. Thus eight D.O.s have applied to York since the medical staff bylaws were changed, and only one applicant -- Dr. Weiss -- has been rejected. *Weiss*, 548 F. Supp. at 1053 (findings of fact Nos. 36-40). The defendants assert that these facts can only be interpreted to mean that the defendants did not discriminate against D.O.s and that D.O.s are not dissuaded by fear of rejection from applying to York hospital for staff privileges. The plaintiffs counter that the jury reasonably concluded that during the pendency of this litigation the defendants had decided not overtly to discriminate against D.O.s, and that the six D.O.s who applied since Weiss' rejection anticipated this decision. The district court apparently agreed and in addition concluded that many more than six D.O.s would have applied for staff privileges at York but for York's discriminatory treatment of D.O.s and the adverse professional consequences of rejection. *Weiss*, 548 F. Supp. at 1058.

privileges depending on their level of skill as certified by the various M.D. specialty Boards. *See Weiss* 548 F. Supp at 1051, 1060, & 1061 (finding of fact No. 8, conclusion of law No. 1, & order Nos. 1.1 & 1.3). The alleged effect of this discrimination was to brand D.O.s as second class doctors.

C. *Staff Privileges Application Procedure*

When a physician applies for staff privileges at York, the following procedure is customarily followed. After the applicant's background and reference information has been gathered, the chairman of the hospital department in which the applicant seeks privileges evaluates the application. In the Family Practice Department, to which Weiss applied, the department chairman selects a department credentials committee to assist the chairman in formulating the evaluation. Once the department makes a recommendation, the Medical Staff's Credentials Committee reviews the application and related file, including the (Family Practice) department's recommendation, and formulates its own recommendation to the Medical Staff Executive Committee. The Medical Staff Executive Committee independently reviews the application and related file and formulates a recommendation on the application to the hospital's Board of Directors.[14]

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14. For a discussion of the relationship between the Medical Staff Executive Committee and the Board of Directors, *see generally Antitrust and Hospital Privileges*, *supra* note 4, at 641. ("[B]ecause the medical staff, like an agency, has 'the authority' to evaluate applicants for privileges, the hospital board functions as a reviewing court that recognizes substantial discretion in the staff and upholds the staff's decision if it is supported by any 'rational basis' or 'substantial evidence.'"); *See also* Dolan and Ralston, *supra* note 4, at 711-712 ("[F]ormalities are misleading . . . . [T]he significant entity in the application process is the medical staff.")

The hospital Board of Directors then refers the application to its standing Medical Affairs Committee, which recommends a disposition of the application. Finally, based on the applicant's file and the various recommendations of the committees, the Board of Directors decides whether to accept or reject the application. If either the Medical Staff Executive Committee or the hospital's Board of Directors makes an adverse decision, the applicant is informed in writing. The applicant may, at that point, request and obtain (1) a written statement of the reasons for the recommendation or decision, and (2) the impanelling of a "judicial review" committee composed of physicians who have had no part in the consideration of the application to that point. The judicial review committee is authorized to hear testimony and receive other evidence to determine whether the adverse recommendation on the application was "in error, unreasonable, arbitrary, or capricious." The applicant is entitled to attend the hearing, to call witnesses and introduce evidence, to cross-examine and impeach witnesses, and otherwise to rebut adverse evidence.[15]

D. *Doctor Weiss' Application for Staff Privileges*

In 1976 Doctors Weiss and Zittle applied for staff privileges in York's Family Practice Department. In accordance with the procedures outlined above, the Family Practice Department Credentials Committee and the chairman of the Family Practice Department considered the applications. On January 17, 1977, the department recommended that they be accepted. The Medical Staff Credentials Committee then reviewed the

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15. The hearing proceedings are stenographically transcribed, but the committee is not bound by the strict rules of evidence.

applications and also recommended acceptance. The Medical Staff Executive Committee, however, did not approve either application. Instead, it took the unusual step of deciding to conduct a further investigation.[16] The Committee made extensive oral and written inquiries concerning the professional competence and moral character of both Weiss and Zittle. No such survey had ever before been conducted by the hospital before. Ultimately the investigation turned up some questions about Dr. Weiss' personality.[17] The investigation also raised some glimmer of a question about Dr. Weiss' medical competence, but the sole "evidence" that was adduced was hearsay, often second

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16. The ordinary procedure is described in Dolan & Ralston, *supra* note 4, at 712 ("When an application is received, it is referred to the specialty service or services for which privileges have been requested . . . . After the application is approved or disapproved, it percolates back up through the system where deference to the decision increases as the application reaches higher levels of review. Absent extraordinary circumstances, the decision to grant a physician privileges approved by the relevant entity is rarely overturned by the entire medical staff committee, which makes the ultimate recommendation to the governing board.").

17. For example, one M.D., Dr. Bauer, who was contacted by the Committee responded with the following comment:

> [C]oncerning Dr. Weiss, my only contacts with him have been at the York Squash Club social gatherings several years ago. I must confess that at the time I found Dr. Weiss rather outspoken, [and] extremely aggressive, but you must understand that these are only my personal observations at some social functions and do not relate directly to Dr. Weiss' medical training and/or skills.

or third level hearsay.[18] Nevertheless, the Medical Staff Executive Committee, apparently based on this "new evidence," decided not to recommend Weiss for staff privileges.

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18. For example, one M.D., Dr. Woerthwein, wrote that although he did not know Dr. Weiss personally, "some" of Dr. Weiss' patients had complained that Dr. Weiss' examinations were "superficial" and his diagnoses were "unfounded." Another M.D., Dr. Myers, wrote that an unnamed D.O. on the staff of Memorial had called Dr. Weiss a "rebel" and said that 90% of Dr. Weiss' patients were medical assistance patients whom he sees "at a very fast rate." A third doctor, an D.O. named Dr. Kammer, reported that Dr. Weiss' contract with Memorial to work in that hospital's emergency room was terminated because Dr. Weiss "related so badly to people of the lower socio-economic class." However, this contention was directly contradicted by other evidence that Dr. Weiss (and Dr. Zittle) had resigned from service in the emergency room because of a dispute over their salary. Finally, the Committee received a letter from Dr. Herman, an M.D., stating that he had been told by someone working in the York office of the Pennsylvania Department of Public Assistance that the office had received "many complaints from patients about incomplete exams by Dr. Weiss and about his lack of rapport with them."

Although it was not known to the committees at York considering Weiss' application for staff privileges, and only revealed in discovery proceedings in this case, the defendants adduced certain evidence tending to show that Dr. Weiss was discourteous to nurses in areas of the hospital where patients might have overheard and been distracted. This evidence was contained in hospital files that the defendants characterized as business records, but the evidence was never admitted, apparently either because the defendants did not authenticate the records or because the district court exercised its discretion to exclude them under Fed. R. Evid. 403 (they were offered solely for impeachment purposes). App. at 5160a-5171a. It is possible that this evidence may be offered again, and we express no view concerning its admissibility at that time since no objection was taken by the defendants to its exclusion at the first phase of this trial.

On June 30, 1977, the hospital Board of Directors considered the recommendations of the various committees which had considered Weiss' and Zittle's applications. The Board voted to approve Zittle's application and deny Weiss' application. Notice of the Board's action was sent to Weiss the same day.

On August 19, 1977, following meetings with York officials, Weiss requested that his application be reactivated and hence reconsidered. This request was granted, and Weiss again received the favorable recommendation of the Family Practice Department's Credentials Committee, and the Family Practice Department chairman. The Credentials Committee's written report is revealing in both its assessment of the "evidence" against Weiss, and in its frank recognition of the "controversy" at York over the admission of D.O.s to staff privileges:

> The Committee invited Dr. Weiss to discuss the reactivation of his application and to direct certain questions to him. He was told of the developments in the past and precisely how his application has been handled and of the problems that had arisen. He was specifically told that almost everybody with whom we spoke acknowledged him to be an intelligent, competent, conscientious physician whose care of his patients in the Hospital was quite competent. He was told that the Chairman of his Department suggested that he probably was the best general practitioner. However, almost everyone to whom we spoke acknowledged that he has had personality problems in the past which have caused him to have difficult interpersonal relations with other members of the staff. He was told that because of this personality problem, his application was rejected. It was further explained to him that because of the controversy that accompanied the

application of osteopaths to the York Hospital, it was felt that acceptance of his application would jeopardize that endeavor. We explained to Dr. Weiss that his admission to the staff would be met in some instances with outright hostility and in others with indifference and it was a matter of real concern to the Committee how he would react to this sort of reception.

Weiss replied that he felt his personal problems had been overstated . . . .

He was questioned at length by every member of the Committee concerning his background, his motivation and his reputed personality problems. Dr. Weiss conducted himself throughout the interview in a professional manner and responded to a number of very difficult questions in a positive, constructive fashion.

. . . . Although the Committee has pursued every allegation in his folder diligently with numerous conversations with numerous people it was unable to find one person who could specifically confirm any of the allegations. The Committee was left with the realization that all the allegations were hearsay, that it was left without one witness who could take the stand and make an intelligent case before a judge or jury. Futhermore, it was the opinion of the Committee after today's interview that Dr. Weiss recognizes the position in which he has placed himself and that he will probably conduct himself in a very careful, cautious, professional manner should he be accepted to the staff at York Hospital.

On February 28, 1978, the Medical Staff Credentials Committee voted to recommend again that Weiss' renewed application be accepted. However, on March 6,

1978, the Medical Staff Executive Committee again voted to recommend that the application be denied.[19]

Weiss' application was next referred to the Medical Affairs Committee of the hospital's Board of Directors. This committee directed that the members of the Family Practice Department Credentials Committee, the Medical Staff Credentials Committee, and the Medical Staff Executive Committee meet informally to attempt to reach a consensus on Weiss' application. The members of these committees then met on March 20, 1978, and voted to recommend that Weiss' application be denied.[20] The Medical Staff Executive Committee then met on April 19, 1978, to re-reconsider Weiss' application and, for the third time, voted to recommend that the hospital Board of Directors deny the application.

On April 21, 1978, York sent Weiss written notice of the April 19, 1978, unfavorable recommendation of the Medical Staff Executive Committee. Upon being advised of the decision of that Committee, Weiss requested and received a statement of reasons. Weiss' status as a D.O. rather than a M.D. was not one of the reasons cited by the Committee in its official statement of reasons. Weiss also requested an appeal to a "judicial review" committee as provided for in the hospital bylaws.

A "Judicial Review" Committee was impanelled[21] and a hearing was held. Weiss was present and represented by counsel at this proceeding. After

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19. The Executive Committee was composed of Doctors Ardison, Bauer, Butler, Kline, and Kushner. These five physicians are named defendants.

20. The vote was six for denial of the application, five for acceptance, one abstaining, and two absent.

21. The Committee consisted of Doctors Laucks, MacDougall, MacKenzie, Whiteley, and Deisher. These five doctors are named defendants.

reviewing all the evidence, the commmittee, on December 28, 1978, determined unanimously that the decision of the Medical Staff Executive Committee not to recommend Weiss for staff privileges was not unreasonable, arbitrary, or capricious. The committee also determined, with one member dissenting, that the Medical Staff Executive Committee was not in error in its recommendation.

The hospital Board of Directors then held a special meeting at which presentations were made by counsel for Weiss and special counsel for the Hospital. On March 13, 1979, the Board voted to deny Weiss staff privileges.

II. *PROCEDURAL HISTORY AND PROBLEMS*

A. *Before the District Court*

On February 6, 1980, Weiss filed this suit in the United States District Court for the Middle District of Pennsylvania. The complaint named as defendants York Hospital, the York Hospital Medical and Dental Staff, and ten individual members of the York medical staff: the five physicians who in their capacity as members of the Medical Staff's Executive Committee voted on Dr. Weiss' application for privileges, and the five physicians who constituted the Judicial Review Committee that was specially impanelled to review the Executive Committee's recommendation that Weiss not be given staff privileges at York.[22] Weiss' complaint alleged that his application for staff privileges at York was denied because of: (1) a concerted refusal to deal with him and all other osteopathic physicians located in and around York, Pennsylvania, in violation of

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22. The ten individual defendants were added in an amended complaint after the district court granted the defendants' motion to dismiss the initial complaint.

section 1 of the Sherman Act, 15 U.S.C. § 1; (2) monopolization, attempted monopolization, and conspiracy to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. § 2; and (3) violation of Pennsylvania antitrust and common law. The alleged relevant geographic market coincided with the York MSA. The district court certified the class of all osteopaths in the York MSA as the plaintiff class.[23]

The liability issues were tried to a jury for three weeks in September, 1982. At the end of the trial the court submitted 42 special verdict questions to the jury. The jury answered all the questions unanimously. The district court molded the jury's answers into

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23. On May 28, 1981, following a two-day hearing, the district court granted plaintiff's motion for class action certification, determining that the action could be maintained under Fed. R. Civ. P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. On September 25, 1981, the district court denied the motion by all defendants for summary judgment. Weiss v. York Hospital, 524 F. Supp. 433, 442 (M.D. Pa. 1981).

Subsequently the defendants sought two writs of mandamus and prohibition from this Court. In one matter, No. 81-2191, the petition was directed to the district court's certification of the plaintiff class. This Court denied the petition holding that mandamus and prohibition were not available. In the other matter, No. 81-2171, the court denied a petition directed to the district court's order authorizing discovery of confidential income data of approximately 100 M.D.s in the York area until completion of the liability portion of the bifurcated trial, and retained -- and still retains -- jurisdiction in the matter. The opinion in both matters is reported as DeMasi v. Weiss, 669 F.2d 114 (3d Cir. 1982).

Thereafter, defendants filed a motion before the district court to decertify the class. The motion was denied on August 18, 1982.

findings of fact,[24] and, based on these findings, the court reached the following conclusions of law:

> 1. On the § 1 claim, the staff (but not the hospital) is liable to the plaintiff class but not to Weiss;
>
> 2. On the § 2 claims, the hospital (but not the staff) is liable to both Weiss and the class for monopolization, attempted monopolization, and conspiracy to monopolize;
>
> 3. On the pendent state law claims, the hospital (but not the staff) and four physicians are liable to Weiss but not the class for interference with contractual relations; and
>
> 4. The remaining six physician defendants are not liable to anyone for anything.

Weiss, 548 F. Supp. at 1060-62.[25] The court then held an additional one-day hearing to consider plaintiff's

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24. There were three sets of "findings" made during the trial of this case. First, the jury made findings when it answered the 42 special verdict questions propounded to it by the district court. *Weiss*, 548 F. Supp. at 1051. Second, the district court, in a written opinion subsequent to the jury verdict, made 40 findings of fact, the first 28 of which were explicitly based on (and in fact were merely restatements of) the jury's answers to the special verdict questions. *Id.* at 1051-53. Third, the remaining 12 findings of fact were apparently made by the district court in its role as a court of equity deciding whether or not to issue an injunction against the defendants. In addition, of course, the district court made conclusions of law which were essentially molding the jury's answers into verdict form. *Id.* at 1060-61.

25. The defendants have provided the following chart, which is helpful in visualizing the district court's conclusions of law:

request for equitable relief. Based on the jury's answers to the special verdict questions, the court's findings of fact and conclusions of law, and the additional hearing on equitable relief, the district court entered a final order pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26, enjoining the hospital and the medical staff from:

> 1. undertaking any act against Weiss or the class "which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital;"

Defendants	§ 1 Sherman Act (Weiss & Class)	§ 2 Sherman Act (Weiss & Class) Monop./Attempt/Consp.			State Law (Weiss Only)
York Hospital	--	W&C	W&C	W&C	W
York Hospital Medical Staff	C	--	--	--	--
Ardison	--	--	--	--	--
Bauer	--	--	--	--	W
Butler	--	--	--	--	W
Deisher	--	--	--	--	W
Kline	--	--	--	--	--
Kushner	--	--	--	--	W
Laucks	--	--	--	--	--
MacDougall	--	--	--	--	--
MacKenzie	--	--	--	--	--
Whiteley	--	--	--	--	--

W = Liable to named plaintiff
C = Liable to class
-- = Exonerated

2. "applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians." and

3. "interpreting the expression 'American Board of Medical Specialty' as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty."

Weiss, 548 F. Supp. at 1061.

In addition to entering the injunction, the district court also entered the following "judgment on special verdict":

> JUDGMENT ON SPECIAL VERDICT -- "that the York Hospital Medical and Dental Staff is liable to the Plaintiff Class for violations of Section 1 of the Sherman Act: Further, that the York Hospital is liable to Plaintiff Malcolm Weiss and the Plaintiff Class for violations of Section 2 of the Sherman Act: Further, that the York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S.W. Deisher, M.D. and Lois Kushner, M.D., are liable to Plaintiff Malcolm Weiss for tortiously interfering with his contractual relations with third parties. It Is Further Adjudged that Gary Ardison, M.D., Jack A. Kline, M.D., S. Philip Laucks, M.D., Harold H. MacDougall, M.D., Iain L. MacKenzie, M.D. and John P. Whiteley, M.D., are not liable to either Plaintiff Malcolm Weiss or the Plaintiff Class: Further, that as against the Defendants named in the preceding paragraph Plaintiff Malcolm Weiss and the Plaintiff Class shall take nothing and this action shall be dismissed" as to the them.

Weiss, 548 F. Supp. at 1062. On October 12, 1982, the defendants moved the district court to certify this "judgment on special verdict" as final pursuant to Fed. R. Civ. P. 54(b). Plaintiff opposed this motion for certification by memorandum filed October 27, 1982. On November 18, the district court granted the defendants' motion and entered the following order:

> 1. The defendants' motion for certification is granted.
>
> 2. This Court hereby certifies that there is no just reason for the delay of an appeal in this case.
>
> 3. The Clerk of Court is hereby directed to amend the judgment on special verdict entered September 30, 1982, as follows:
>
> > It is ordered that the judgment on Special Verdict entered on September 30, 1982, is final pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

B. *Appellate Jurisdiction*

Three appeals have been filed in this case. The first is an appeal filed on October 28, 1982, by the hospital and staff from the district court's injunction which was entered on September 30, 1982. The second appeal is by the hospital, the staff, and the four individual defendants who were found liable to the plaintiffs under the Sherman Act and state law; this appeal was filed on December 9, 1982, from the "order and final judgment entered 11/18/82 and order entered 11/22/82 denying these defendants' motion for judgment notwithstanding verdict or for a new trial and all other orders, rulings and judgments of the court." The third appeal was filed on December 13, 1982, by the plaintiff. This appeal is denominated a "cross-appeal" and is from the "orders directing judgment in favor of certain defendants which became final on November 18, 1982."

The defendants' appeal from the grant of the injunction is authorized by 28 U.S.C. § 1292(a)(1) and therefore it is clearly before us.[26] The viability of the other two appeals presents much more difficult questions. Because the two appeals raise different problems, we consider them separately.

1. *The Defendants' December 9th Appeal*

The December 9th appeal by the defendants purports to be from the "judgments" (other than the injunction) that resulted from the district court's September 30th "special verdict." However, because the trial was bifurcated and additional proceedings, including the determination of certain defenses and of damages, are yet to take place, most of these "judgments" (i.e., those not resulting in verdicts for the defendants) are not final within the meaning of 28 U.S.C. § 1291, *see Catlin v. United States*, 324 U.S. 229, 233 (1945) (a "final decision" for purposes of 28 U.S.C. § 1291 "is one which ends the litigation on the

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26. The injunction was entered on September 30, 1982, and the defendants appealed it on October 28, 1982, within the thirty days provided by Fed. R. App. P. 4(a)(1). However, on October 12, 1982, the defendants made a motion under Rule 50(b) for judgment notwithstanding the verdict or for a new trial and that motion was not denied by the district court until November 22, 1982. Under the rule announced in Griggs v. Provident Consumer Discount Co., 103 S.Ct. 400 (1983), a timely-filed Rule 50(b) motion prevents the parties from appealing the judgment until the district court decides the motion. *See* Fed. R. App. P. 4(a)(4). Therefore, if the defendants Rule 50(b) motion was timely filed, the October 28th appeal was void. Fortunately for defendants, however, their Rule 50(b) motion was not timely filed because it was brought one day late, *see* Turner v. Evers, 726 F.2d. 112, 113 n.2 (3d Cir. 1984) (explaining computation rules of Fed. R. Civ. P. 6(a)), and therefore the appeal from the injunction was valid. Fed. R. App. P. 4(a)(4).

merits and leaves nothing for the court to do but execute the judgment"); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1321 (5th Cir. 1976) ("a finding of 'liability' in Phase I of a bifurcated trial is interlocutory"); *see also Sun Shipbuilding & Dry Dock Co. v. Benefit Review Board*, 535 F.2d 758, 760 (3d Cir. 1976). Moreover, as to those judgments in defendants' favor, having prevailed, they cannot appeal. Therefore, it would appear that we have no jurisdiction to hear this appeal.

The defendants argue, however, that we have jurisdiction because of the November 18, 1982, order of the district court certifying the September 30, 1982, "judgment on special verdict" as final pursuant to Fed. R. Civ. P. 54(b).[27] Rule 54(b), however, does not authorize the district court to certify non-final decisions as final; rather, the Rule's purpose is to permit the district court to separate out final decisions from non-final decisions in multiple party and/or multiple claim litigation in order to allow the losing party an immediate appeal. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742-44 (1976) (partial summary judgment limited to the issue of liability, which reserves the issue of damages and other relief, is not "final" within the meaning of 28 U.S.C. § 1291).

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27. Rule 54(b) states:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The defendants' December 9th appeal must therefore be dismissed for two reasons. First, all of the *final* decisions that resulted from the September 30th "judgment on special verdict" were in favor of the defendants and the defendants cannot appeal decisions that they have won. Second, because additional portions of the bifurcated trial have not yet been held, all the "judgments" *against* the defendants arising out of the September 30th special verdict are non-final and therefore not appealable under 28 U.S.C. § 1291. Furthermore, these non-final "judgments" do not fall within any of the limited exceptions for interlocutory appeals.[28] Thus, this Court is without appellate jurisdiction to hear the defendants' December 9, 1982, appeal.

The defendants suggest that even if the non-final decisions that resulted from the special verdict are otherwise non-appealable, we can review those decisions under the doctrine of "pendent appellant jurisdiction," citing *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448 (3d Cir. 1982) (in banc). In *Kershner*, Judge Adams, speaking for the full Court, narrowly construed the pendent appellate jurisdiction doctrine stating:

> If the . . . issue appealable under section 1292(a)(1) *cannot be resolved* without reference to the otherwise nonappealable . . . issue -- either because the latter issue directly controls disposition of the former, or because the issues are, in some other way, inextricably bound -- then both issues *must* be addressed in order to resolve properly the section 1292(a)(1) . . . issue. In such a situation, the appellate court has no choice: any more limited review would deprive

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28. The case was not certified under 28 U.S.C. § 1292(b), nor does it fall under the collateral order or other judge-made exceptions to the finality doctrine.

> the appellant of his or her congressionally mandated right to a section 1292(a)(1) interlocutory appeal. If, on the other hand, the appellate court can dispose of the section 1292(a)(1) appeal without venturing into otherwise nonreviewable matters, its jurisdiction should be limited accordingly.

Id. at 449 (emphasis in original; footnotes omitted). *See also Allegheny County Sanitary Authority v. U.S.E.P.A.*, 732 F.2d 1167, 1173 (3d Cir. 1984).

In applying the *Kershner* doctrine to this situation, we understand that, to the extent that there are factual or legal issues that must be resolved in ruling on the appealable orders, our holdings on those issues will be the law of the case and control in possible future appeals. However where, as here, there are significant issues involved in the non-appealable orders which are (or may be) different from issues involved in the appealable orders, we do not have pendent appellate jurisdiction to review those non-appealable orders. For example, while we conclude, *infra* text accompanying notes 30-32, that there is no requirement that each member of the plaintiff class must make a demand for staff privileges in order for the class to qualify for injunctive relief pursuant to section 16, we specifically reserve the question whether a demand is required in order to recover treble damages pursuant to section 4. This latter issue is not "inextricably bound" with the appeal from the injunction and therefore we may not exercise pendent appellate jurisdiction to decide it. Similarly none of the issues involved in the non-final state law claims are inextricably bound up with the appeal from the injunction or the appeal for the dismissed state law claims and therefore these issues are also not appealable. In sum, the *Kershner* doctrine does not save the defendants' December 9th appeal.

2. *The Plaintiffs' December 13th "Cross-Appeal"*

The plaintiff appealed from a number of final judgments against the plaintiff and the plaintiff class, in the December 13th cross-appeal. As to plaintiff Weiss there are final judgments:

(1) in favor of defendant York on his section 1 claim;

(2) in favor of the defendant medical staff on all claims (sections 1 and 2 and state law); and

(3) in favor of defendants Ardison, Kline, Laucks, MacDougall, MacKenzie, and Whiteley on all claims, and in favor of defendants Bauer, Butler, Deisher, and Kushner, on the sections 1 and 2 claims.

As to the plaintiff class there are final judgments:

(1) in favor of defendant York on the section 1 claim;

(2) in favor of the defendant medical staff on the section 2 claim; and

(3) in favor of all individual defendants on the sections 1 and 2 claims.

Since the district court's order certifying the "special verdict" pursuant to Rule 54(b) does not distinguish what decisions have been certified, we assume that the court intended to certify every *final* judgment that resulted from the special verdict, including those against the plaintiff and the plaintiff class. It would therefore seem that, because the plaintiff filed his notice of appeal within thirty days of the Rule 54(b) certification, the judgments listed are properly before us.

There is, however, one potential problem of jurisdiction over the plaintiffs' cross-appeal. Rule 54(b)

certification was sought by the defendants, and actively opposed by the plaintiff. The district court granted the certification, but its order did not indicate which "judgments" it intended to certify. Thus it may be that the certification brings up only those claims on which a final decision was entered against the defendants. But all of the potentially appealable decisions in this case are against the plaintiff. Apparently the defendants (and the district court) thought that the Rule 54(b) certification would make the claims on which the plaintiff won on the liability issue, but for which the question of damages had not yet been tried, appealable, a belief we have shown to be erroneous. Had the defendants realized that their rule 54(b) certification motion would accomplish nothing for them, but might result in bringing up for review judgments in their favor which plaintiffs had not initially sought to have have reviewed at that stage, they might not have sought a Rule 54(b) certification. The question, then, is whether the combination of the "blanket" Rule 54(b) certification issued at the *defendant's* request and over the plaintiffs' opposition, and the plaintiffs' cross-appeal, are sufficient to bring before us the final decisions against the plaintiffs.

We have been unable to find any cases or treatises that discuss the efficacy of a Rule 54(b) certification issued at the behest of a party against whom there are no final judgments, or by the district court *sua sponte*. We nevertheless conclude that the policy of Rule 54(b) to permit immediate appeals from final decisions in complex litigation renders the district court's Rule 54(b) certification efficacious under the circumstances of this case, i.e., where: (1) the plaintiffs' appeal is from several *final* decisions; (2) the parties have briefed and argued the legal questions already; and (3) we have to review the propriety of the injunction which is based on the same factual

circumstances as the various final judgments against the plaintiffs and involves most of the same legal issues. The plaintiffs' cross-appeal is thus properly before us.[29]

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29. The final judgments entered against plaintiff Weiss are:

- on the section 1 claim: in favor of York, the staff, and all individual defendants;
- on the section 2 claim: in favor of the staff and all individual defendants;
- on the state law claims: in favor of the staff and Doctors Ardison, Kline, Laucks, MacDougall, MacKenzie, and Whiteley.

The final judgments entered against the plaintiff class are:

- on the section 1 claim: in favor of York and all individual defendants;
- on the section 2 claim: in favor of the staff and all individual defendants;
- on the state law claims: the class made no state law claims.

We affirm all the dismissals as to the individual defendants because we believe the evidence supports the jury's conclusions on these claims. We also affirm the dismissal of Weiss' and the class' section 2 claims, against the medical staff, on the same ground. We reverse the dismissal of Weiss' section 1 claim against the medical staff for the reasons stated *infra* text accompanying notes 52-63. Finally, we affirm the dismissal of Weiss' and the class' claims against York because we believe that these decisions are also supported by evidence in the record. We note however that exoneration of York Hospital on the section 1 claims does not necessarily result in the dismissal of the action as to York. The medical staff (which the jury found liable on section 1 grounds, and which decision we affirm, *see infra* text accompanying notes 43-66) does not exist independent of the hospital, and therefore the hospital may be liable to pay any award of money damages in favor of the plaintiffs and against the staff under section 4 which may result in the future, on a respondeat superior theory of liability. We leave this question to another day.

C. *Class Certification*

The district court granted the plaintiff's motion for class certification, determining that the action could be maintained pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of a class of all osteopathic physicians practicing medicine in the York MSA. The defendants attack the class certification on several grounds.

1. *The Necessity of Proof of Demand*

The defendants contend that the law of this Circuit is "clear" that where a claim is based upon an unlawful refusal by defendant to deal with the plaintiff, that plaintiff -- and hence each class member -- must allege and prove a demand which the defendant rejected. In support of this proposition the defendants cite *Mazus v. Dept. of Transportation, Commonwealth of Pa.*, 629 F.2d 870 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), and *Lawlor v. Nat'l Screen Service Corp.*, 270 F.2d 146, 154 (3d Cir. 1959), *cert. denied*, 362 U.S. 922 (1960). But we are not here faced, as in those cases, with the question whether each member of the class must have made a demand and have been rejected in order to obtain *damages* from the defendants (that question is posed by the dismissed appeals). We thus find these cases to be inapposite to the limited issue before us on these appeals -- i.e., whether the law requires as a prerequisite to *injunctive* relief that each member of the (b)(2) class have had an application for staff privileges rejected by the hospital.[30] We thus turn to analysis of the question.

A private antitrust claim has two parts. A plaintiff must demonstrate "a violation of the antitrust laws" -- in this case sections 1 and 2 of the Sherman Act -- and

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30. We reserve the question of the right of class members to recover treble damages under section 4 of the Clayton Act in the absence of a demand. *See infra* note 32.

he must also prove the right to either the treble damage remedy given by section 4 of the Clayton Act or the equitable remedy afforded by section 16 of that Act. *See Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Cf. Double H Plastics, Inc. v. Sonoco Products Co.*, 732 F.2d 351 (3d Cir. 1984) (Gibbons, J., dissenting). In a case challenging market exclusion under section 1 of the Sherman Act, the formation of a conspiracy with the requisite exclusionary purpose forms the essence of the violation. *See generally Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945); *American Medical Association v. United States*, 317 U.S. 519 (1943). Similarly, under section 2 of the Act, it is the willful acquisition or maintenance of monopoly power that is the essence of the offense. *See generally Otter Tail Power Co. v. United States*, 410 U.S. 366, (1973). *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912). In both instances, the violation is based on the defendant's conduct, rather than on the effect on the plaintiff. On the question of appropriate relief under section 4 or 16, however, effect on the plaintiff becomes critical. This is demonstrated by a comparison of the language of the two sections and the caselaw thereunder.

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

As in the case of common-law torts, the right to antitrust damages is limited to those plaintiffs who can demonstrate a causal relationship between the defendants' unlawful conduct and their economic injury. *See Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 648-49, (1969).[31]

Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . .

In contrast to section 4, section 16 contains no requirement that a plaintiff prove actual injury to his business or property caused by the antitrust violation. Instead, section 16 authorizes injunctive relief for any person who demonstrates "threatened loss or damage by a violation of the antitrust laws." Thus it is generally said that section 16 imposes a lower threshold "standing" requirement on a plaintiff than does section 4. *See, e.g., Bogus v. American Speech &*

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31. Moreover, even beyond the requirement of causation, the federal courts, where "pervasive reasons of antitrust policy" warrant, have fastened certain artificial limitations upon the plaintiff's right to recover treble damages. *See generally* Bogosian v. Gulf Oil Corp., 561 F.2d 434, 454-55 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). For example, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the court concluded that, in view of the potential for duplicative recoveries and problems of proof, the right to recover damages for price fixing should generally be confined to the direct purchasers of the price-fixed products.

Hearing Ass'n, 582 F.2d 277, 288 (3d Cir. 1978); L. Sullivan, *Handbook of the Law of Antitrust* § 247, at 772 (1977). The courts have applied section 16 "more expansively, both because its language is less restrictive than that of section 4, . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy." *Bogus*, 582 F.2d at 288-89; *see Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 261-62 (1972); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969).

In *Zenith Radio Corp.*, 395 U.S. at 130, the Supreme Court reversed a court of appeals decision setting aside the district court's grant of injunctive relief stating:

> The evident premise for striking [the injunctive relief] was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury: . . . he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur . . . .
>
> Moreover, the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the

> antitrust laws . . . . Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." . . . Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect."

Zenith, 395 U.S. at 130-131 (footnote omitted). *See also Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979) (court held that the *Illinois Brick* direct purchaser rule did not preclude an indirect purchaser from obtaining injunctive relief against price fixing under section 16 of the Clayton Act.)

In view of the differences between sections 4 and 16, especially as explicated in *Zenith*, we conclude that the question whether a defendant has violated sections 1 and/or 2 of the Sherman Act is independent of the question whether each class member must have made a "demand" for staff privileges in order to obtain an injunction and/or treble damages; and that the putative demand requirement is only relevant (if at all) to a plaintiff's right to claim treble damages once a violation has been established. Even if there is no actionable injury in the absence of a D.O.'s demand for hospital privileges (and refusal), there is threatened injury, for the jury found that York hospital and its medical staff had adopted a discriminatory policy towards D.O. applicants for staff privileges, and the court found as a fact that "[t]he denial of hospital staff privileges to a physician . . . is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician." *Weiss*, 548 F. Supp. at 1052 (finding of fact No. 29). In this

factual situation, it would be fundamentally inconsistent with section 16's stated purpose of providing relief against "*threatened loss*" to require that each member of the plaintiff class have made a demand for staff privileges as a prerequisite to obtaining injunctive relief. A contrary conclusion would result in a rule requiring the class to suffer *actual* harm (besmirching of their professional reputations resulting from denial of their applications) caused by the defendants' antitrust violations in order to qualify for injunctive relief against *threatened* harm from the same violations. That result is unacceptable.[32]

We therefore hold that where the plaintiff class is a (b)(2) class -- i.e., one that seeks primarily injunctive relief -- a demand by each member of the class is not a prerequisite to injunctive relief, at least where the plaintiffs have established that the denial of a physician's application for staff privileges is injurious to the physician's professional reputation.

2. *The Requirements of Fed. R. Civ. P. 23*

As we noted above, the district court, pursuant to Fed. R. Civ. P. 23, certified Weiss as the representative of the class of all osteopathic physicians in the York MSA. The defendants challenge that certification on two grounds: first that the plaintiff and plaintiff class do not satisfy the four threshold requirements for class action certification contained in Rule 23(a), and second that the district court improperly certified the plaintiff class as (b)(2) class. We address these contentions in turn.

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32. We express no view as to whether a demand is required in non-(b)(2) class situations. Nor do we decide whether the individual members of a (b)(2) class must prove a demand and refusal in order to recover treble damages under section 4 of the Clayton Act. That matter will have to be resolved in a subsequent phase of this case.

a. *Rule 23(a)*

Fed. R. Civ. P. 23(a) contains the threshold requirements for the maintenance of any type of class action. The Rule provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

For the reasons that follow, we conclude that the plaintiff class in this case satisfied the four requirements of Rule 23(a).[33]

(i) *Numerosity*

The first requirement is that the class must be so numerous that joinder of all members is impracticable. The defendants argue that because there are approximately 92 members in the class, all class members live and work in the York MSA, and all class members can be identified with "minimal effort" and joined in this action with "minimal inconvenience."[34]

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33. The scope of review of an order denying or granting a motion to maintain a class is narrow. "If the district court properly applies the relevant criteria, we may reverse its order only for an abuse of discretion." Mazus v. Dept. of Transp., Commonwealth of Pa., 629 F.2d 870, 876 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *see* Paton v. La Prade, 524 F.2d 862, 875 (3d Cir. 1975); Katz v. Carte Blanche Corp., 496 F.2d 747, 756-57 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 885 (1974).

34. Weiss v. York County Hospital, Civ. No. 80-0134, at 3 (M.D. Pa. filed 3/28/81) (findings of fact Nos. 8-10) [App. at 1507a].

the numerosity requirement has not been satisfied. The district court gave two reasons for reaching the contrary conclusion. First, the court noted that the primary relief sought by plaintiffs was injunctive, and stated that in such cases a "strict application (requiring the class to consist of hundreds or more persons) of the numerosity requirement is unwarranted." *Weiss v. York County Hospital*, Civ. No. 80-0134, at 9-10 & 19 (M.D. Pa. filed 3/28/81) [App. at 1513a-1514a, 1523a], *citing Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (class of 46 employees of defendant satisfies numerosity requirement where primary relief sought is injunctive) and *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975) (class of 48 prisoners seeking injunctive relief upheld). Second, the district court concluded that the "individual interest in controlling this litigation is minimal." We agree with the district court that the numerosity requirement is satisfied in this case.

In most cases where a plaintiff seeks injunctive relief against discriminatory practices by a defendant, the defendant will not be prejudiced if the plaintiff proceeds on a class action basis, as opposed to an individual basis, because the requested relief generally will benefit not only the claimant but all other persons subject to the practice under attack. 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1771, at 663-64 (1972). A judicial determination that a particular practice infringes upon protected rights and is therefore invalid will prevent its application by the defendant against many persons not before the court. Thus rigorous application of the numerosity requirement would not, as the district court noted, appear to be warranted. Also supporting this view is the fact that, as this case demonstrates, and as the district court observed, generally speaking, individual

interest in pursuing litigation where the relief sought is primarily injunctive will be minimal. *Id.* Weiss demonstrated an obvious commitment vigorously to pursue the antitrust claim against the defendants. This commitment apparently did not escape the other D.O.s in the York MSA because no D.O. sought to intervene in the lawsuit or otherwise challenge Weiss' leadership.

Given our conclusion that the interests of the plaintiff class and the interests of the defendants will not be affected significantly by permitting Weiss to maintain this class action, we agree with the district court that a strict application of the numerosity requirement is not required here. Consequently, the district court did not abuse its discretion in concluding that the class of 92 D.O.s who work in the York MSA was sufficiently numerous to satisfy the requirements of Rule 23(a)(1). Of course, 92 class members might be enought in any event.[35]

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35. On the subject of how many is enough, Professor Moore has written:

> While the attitude taken towards a given number may vary, each opinion reflects a practical judgment on the particular facts of the case. Thus no hard and fast number rule can or should be stated, since "numerosity" is tied to "impracticability" of joinder under the specific circumstances. Nevertheless, some general tendencies can be observed. While there are exceptions, numbers under twenty-one have generally been held to be too few. Numbers between twenty-one and forty have evoked mixed responses and again, while there are exceptions, numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the requirement.

3B J. Moore, Moore's Federal Practice ¶ 23.05[1], at 23-150 (2d ed. 1982) (footnotes omitted).

(ii) *Commonality*

Rule 23(a)(2) requires that there be questions of law or fact common to the class, although not all questions of law or fact raised need be in common. 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1763, at 603 (1972). The district court concluded that all class members were in a "substantially identical factual situation" and that the "questions of law raised by the plaintiff are applicable to each [class] member." While we concede that some questions have been raised with respect to Dr. Weiss that might not be raised with respect to other members of the class, i.e. the allegations of lack of professional competence and conduct, common questions by far predominate especially with respect to the claim for injunctive relief, hence we conclude that the second requirement of Rule 23(a) has been met. This case will have to be remanded for trial of the competence and conduct defenses of such damage claims as Weiss and members of the class may assert. There is no inconsistency between class certification, particularly (b)(2) class certification, and the individual trial of damage claims which may present disparate issues. *See Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979).

(iii) *Typicality*

Defendants also argue that Weiss' claims are not typical of the class. Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. The meaning of this requirement has historically been somewhat elusive.[36] However, Weiss' claims are plainly

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36. Professor Moore has concluded that there is no need for this subsection at all, "since all meanings attributable to it duplicate requirements prescribed by other provisions in Rule 23." 3B J. Moore & J. Kennedy, *Moore's Federal*

Practice ¶ 23.06-2, at 23-185 (2d ed. 1982). Some courts have equated typicality with commonality, while others have held that it is more akin to the Rule 23(a)(4) requirement that the representative party adequately protect the interests of the class. 4 *Newberg on Class Actions* § 7983. *See* 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1764 (1972) and cases cited therein. Still other courts and commentators have attempted, quite correctly we think, to ascribe an independent meaning to Rule 23(a)(3) and have posited various tests by which the court may determine whether the prerequisite has been met. A widely utilized formulation has been that advanced in 7 Wright and Miller, *supra*, § 1763, at 614:

> . . . [P]laintiff has satisfied Rule 23(a)(3) if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory. Of course, when this is true the standard under subdivision (a)(3) is closely related to the test for the common-question prerequisite in subdivision (a)(2). On the other hand, Rule 23(a)(3) may have independent significance if it is used to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common questions of law or fact are raised.

This approach focuses on the legal and/or factual stance assumed by the class representative as compared with that of the class members. Under this approach, while factual variations will not defeat certification where the various claims arise from the same legal theory, where the named plaintiff's individual circumstances are markedly different or where the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based, there exists the danger that the unique circumstances or legal theory will receive inordinate emphasis and that the other claims will not be pressed with equal vigor or will go unrepresented. Wofford v. Safeway Stores, Inc., 78 F.R.D. 460, 489 (N.D. Cal. 1978); Karan v. Nabisco, Inc., 78 F.R.D. 388, 405 (W.D. Pa. 1978);

Cohen v. Uniroyal, Inc., 77 F.R.D. 685, 691-92 (E.D. Pa. 1977). ("[M]ere anticipation that all class members will benefit from the suit . . . is not enough. But interests sufficiently parallel to ensure a vigorous and full presentation of all potential claims for relief should satisfy Rule 23(a)(3)"). *See* Scott v. University of Delaware, 601 F.2d 76, 84 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). Illustrative of this approach is Donaldson v. Pillsbury Co., 554 F.2d 825 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977), in which the court described the typicality prerequisite variously as a requirement that there be other members of the class who have the *same or similar grievances*, *id.* at 830; that the charge be based on patterns or practices *not special or unique* to plaintiff, *id.* at 831; that a significant number of other members of the class have been *similarly victimized by the same patterns or practices*. *Id.*

The approach of *Donaldson* and of other courts adopting the Wright and Miller formulation thus appears to be an attempt to attribute semantic integrity to the term "typicality," by using what is essentially its common sense definition and positing that where the plaintiff's factual or legal stance is not characteristic of that of other class members, the typicality prerequisite has not been met. In something of a variation of the above analysis, other courts have held that in order to satisfy the typicality requirement, plaintiff must show that the issues of law or fact he or she shares in common with the class occupy "the same degree of centrality" to his or her claims as to those of unnamed class members. Parker v. Bell Helicopter Co., 78 F.R.D. 507 (N.D. Tex. 1978); Cottrell v. Virginia Electric & Power Co., 62 F.R.D. 516 (E.D. Va. 1974); *see* Wofford, 78 F.R.D. at 489. A similar formulation is the "nexus text." *See* Hannigan v. Aydin Corp., 76 F.R.D. 502, 508 (E.D. Pa. 1977), a Title VII case where Chief Judge Joseph S. Lord, III wrote that typicality exists where plaintiff has demonstrated some "nexus" with the claims of other class members, which can be shown by demonstrating the similarity between the conditions of employment of plaintiff and those of other class members, the similarity between the alleged discrimination practices on the named plaintiff and that affecting the class, and by the compatability of the relief requested and that appropropriate for the class.

"typical" of the claims of the class whichever of the several approaches to the meaning of this term is used. The essential legal claim of all the plaintiffs, including Weiss, is that they are osteopathic physicians who can not obtain staff privileges at York because of a scheme by the M.D.s who control admissions at York to exclude them in violation of the antitrust laws. In addition the factual matrix that suggests this legal claim is the same for all the plaintiffs, again including Weiss.

Defendants argue that *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) requires the conclusion that plaintiffs' claims are atypical of the class' claims:

> There are obviously two disparate groups subsumed in the class certified below: the osteopathic physicians who have not applied for staff privileges, allegedly dissuaded by fear, and the one applicant who applied and was rejected. . . . [under *Falcon*], Weiss could not be the class representative for the former group, and the two groups could not be encompassed in the same class.

Defendants' Brief at 26. This argument fails for two reasons. First, the Supreme Court in *Falcon* did not hold that the plaintiff could not represent the class; the Court merely held that the requirements of Rule 23(a) are not waivable in a Title VII case, and therefore that the plaintiff had to make the required presentation demonstrating that he satisfied the requirements of

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We view the "centrality" and "nexus" tests as functionally indistinguishable from the Wright-Miller/*Donaldson* "marked difference" formulation: each test attributes to the typicality requirement what we have termed a semantic integrity by focusing on its dictionary or common sense meaning. We see no point in attempting an additional formulation, for we could not improve on the foregoing.

that rule.[37] Weiss made the required presentation in this case and the district court found that the class was sufficiently numerous, that there was a commonality of issues, that the plaintiff's claims were typical of the class' claims, and that the plaintiff would adequately represent the class' interests. Therefore, *Falcon* is inapposite. Second, defendant's dichotomy between those who have applied and been rejected and those who are afraid to apply is not enough to carry the day, for, in essence, there is only one class advanced in this case -- the osteopathic physicians in the York MSA who are the intended victims of York's discriminatory admissions policy. Thus, as we have stated, the typicality requirement is met in this case.

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37. In *Falcon*, a Mexican-American employee filed suit in federal court under Title VII claiming racial discrimination in defendant's refusal to promote him. Without conducting a hearing on whether the prerequisites of Rule 23(a) were met, the district court, pursuant to the Fifth Circuit's rule permitting the victim of racial discrimination in employment to maintain an "across-the-board" attack on all the employer's racially discriminatory policies, certified a class consisting of Mexican-American employees of the employer and Mexican-American applicants who had not been hired by the employer. The Supreme Court rejected the contention that the requirements of Rule 23(a) could be by-passed in Title VII cases. Instead, the Court held that the requirements of Rule 23(a) "limit the class claims to those fairly encompassed by the named plaintiff's claim." 457 U.S. at 156 (citing General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 (1980)). The Court went on to hold that it was error for the district court to presume "[w]ithout any specific presentation identifying the questions of law or fact that were common to the claims of [the plaintiff] and of the members of the class he sought to represent," that the plaintiff's claims against the employer were typical of the claims of other Mexican-American employees and applicants. *Id.* at 158.

(iv) *Adequacy of Representation*

The fourth and final part of the Rule 23(a) test requires that the plaintiff must adequately represent the interests of the class.

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). The quality and experience of plaintiff's counsel is conceded by the defendants. In addition, Weiss testified before the district court that he was willing and able (both financially and otherwise) to pursue this litigation, and that he could perceive no conflict of interest between himself and any class member. The district court concluded that Weiss would fairly and adequately represent the class. We agree and therefore conclude that the requirements of subsection (a)(4) have also been satisfied.

b. *Rule 23(b)(2)*

The defendants also challenge the propriety of the district court's certification of a (b)(2) plaintiff class;[38] however, their objections are based on the failure of class members to have made a demand for staff

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38. Fed. R. Civ. P. 23(b)(2) provides:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
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> . . . .

privileges at York and on their contention that the requirements of Rule 23(a) have not been met. Since we have already decided both these contentions adversely to the defendants, we simply note that the class in this case is a classic (b)(2) class in that the defendants have "acted or refused to act on grounds generally applicable to the class" and the primary relief sought is an injunction against future discrimination. When a suit seeks to define the relationship between the defendant(s) and the world at large, as in this case, (b)(2) certification is appropriate. Thus we affirm the district court's class certification decision.

D. *The Vicinage Requirement Of 28 U.S.C. § 1393(a)*

The final preliminary issue is the defendants' contention that the district court erred in holding the trial in this case at the Lewisburg/Williamsport courthouse rather than the Harrisburg courthouse.[39] The defendants contend that they had a statutory right pursuant to 28 U.S.C. § 1393(a) to be tried in Harrisburg. Section 1393(a) provides:

> (a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;
>
> . . . .

39. The trial in this case was held at the Lewisburg/Williamsport Courthouse because the district court determined that no courtrooms were available in the Harrisburg courthouse during the time scheduled for the trial.

Unlike numerous districts, the Middle District of Pennsylvania has not been subdivided by Congress into divisions. The Middle District has, however, been divided into a number of subdivisions by local court rule. All the defendants in this case reside in the Harrisburg subdivision, and they contend that section 1393(a) gives them the right to be tried there,[40] and that the district court erred when it held the trial of this action in the Lewisburg/Williamsport division over their objection.[41]

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40. We note that by its express terms section 1393(a) does not appear to apply to this case because this suit is not against a "single defendant," but against multiple defendants. However, the section has been applied by several district courts to cases where multiple defendants all reside in the same division. *See, e.g.*, McCroskey v. Texas Marine Survey Co., Inc., 87 F.R.D. 691 (S.D. Tex. 1980); Roark v. Bauer, 181 F. Supp. 330 (N.D. Ohio 1960); Lavietes v. Ferro Stamping & Mfg. Co., 19 F. Supp. 561 (E.D. Mich. 1937); Barfield v. Zenith Tire & Rubber Co., 9 F.2d 204 (N.D. Ohio 1924); *see generally* 1 J. Moore, *Moore's Federal Practice* ¶ 0.143[4], at 1466 (2d ed. 1984); *see also* Torres v. Continental Bus System, Inc., 204 F. Supp. 347 (S.D. Tex. 1962) (statute applies to a corporate defendant that is a resident of the division). Because we hold that section 1393 applies only to congressionally created divisions, we need not decide here whether we would extend the statute to cases involving multiple defendants.

41. In order to demonstrate that they were substantially harmed by having the trial held at Lewisburg/Williamsport rather than Harrisburg the defendants point to 28 U.S.C. § 1861, which guarantees all litigants the right to a trial before a jury "selected at random from a fair cross section of the community in the district or division wherein the court convenes." The defendants argue that, if the trial had taken place in Harrisburg as allegedly required by 28 U.S.C. § 1393(a), they would have had a jury from the Harrisburg area -- one "drawn from a community containing the diversity of minority groups who inhabit both York itself and the Harrisburg Division, but [] not found in any substantial number in the rural counties from which juries

Section 1393(a) does provide that a defendant must be tried in the division of the district court wherein he resides; however, the the statute only applies where the "divisions" have been created by *legislative* action. *See Jenner v. Murray*, 32 F.2d 625 (5th Cir. 1929) (construing predecessor statute to present section 1393); *Patrick Jobbing Co. v. Globe & Rutgers Fire Ins. Co.*, 21 F.2d 106 (W.D. Va. 1927) (same). The Harrisburg division involved in this case was created by court rule not by legislative action. A federal rule of civil procedure promulgated by the Supreme Court cannot and does not affect venue. 1 J. *Moore, Moore's Federal Practice* ¶ 0.143[3], at 1464 (2d ed. 1984). *A fortiori* a local district court rule is similarly limited. *See id.* Because the Middle District of Pennsylvania has no legislatively created divisions, *see* 28 U.S.C. § 118, section 1393's venue provisions are irrelevant to trials conducted there, and the defendants' vicinage claim must be rejected.[42]

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in Lewisburg and Williamsport are drawn." Defendants' Brief, at 64 -- and that, with such a jury the outcome of the trial might well have been different.

42. Local Rule 407.1 of the Middle District Rules does not require a different result. Rule 407.1, which is merely precatory, provides that the trial should be held as close as practical to the defendant's place of residence or principal place of business. Local Rule 407.3 provides that "notwithstanding any other provisions of this Rule, in all actions the court shall have the right to designate the place of trial for the convenience of the court or of all the parties and witnesses." In this case the district court attempted to accommodate the convenience of all concerned. Trial was scheduled for Lewisburg/Williamsport only after the district court determined that no courtroom was available in Harrisburg. Its decision in this regard certainly cannot be characterized as an abuse of discretion.

Our conclusion that the district court did not err as a matter of law in trying the case in Williamsport should not, of course, be taken as a suggestion that the ensuing phase of the trial also be tried in Williamsport as opposed to Harrisburg.

III. *THE SHERMAN ACT CLAIMS*

We now turn to the substantive-law questions presented by this appeal. In part A of this section, we deal with the appeal from the district court's conclusion that the medical staff is liable to the class under section 1 of the Sherman Act; in part B, we discuss the hospital's appeal from the finding of liability against it under section 2 of the Sherman Act; and in part C, we review the propriety of the injunction issued against both the medical staff and the hospital.

A. *Section 1 of the Sherman Act*

In order to establish a violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), a plaintiff must establish three elements: (1) a contract, combination, or conspiracy; (2) restraint of trade; and (3) an effect on interstate commerce. Each of these three elements has been the subject of extensive analysis by the courts, and we now turn to a discussion of that caselaw and its application to the facts of this case, taking the elements up in turn.

1. *Proof of an Agreement: Is There a Sufficient Number of Conspirators?*

In order to establish a violation of section 1, a plaintiff must prove that two or more distinct entities agreed to take action against the plaintiff. Before the district court, Weiss contended that the hospital and its medical staff were legally distinct entities and therefore capable of conspiring in violation of section 1. He also asserted that the doctors who joined together to form the medical staff were separate economic entities who competed against each other so that, as a matter of law, the medical staff was a "combination" of doctors within the meaning of section 1. Finally, Weiss argued that even if the individual doctors who made up York's medical staff were deemed by the court to be the equivalent of "officers or employees" of the hospital and

therefore ordinarily not capable of conspiring with the hospital, nevertheless the doctors were acting for their own benefit in discriminating against osteopaths, and therefore fell within an exception to the ordinary rule that "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2741 (1984).[43]

The defendants countered that York and its medical staff were legally one entity and therefore incapable of conspiring. In addition the defendants asserted that the individual doctors who made up the medical staff were the equivalent of "employees or officers" of the hospital and hence legally incapable of conspiring with the hospital. Finally the defendants asserted that they had not discriminated against osteopaths and therefore that the putative exception to the general rule did not apply in this case.

The district court concluded, and instructed the jury, that the medical staff was an "unincorporated division" of the hospital, and as such the two were legally a "single entity" incapable of conspiring. In addition, the court instructed the jury that the hospital, as a corporation, could act only through its "officers and and agents," and that in proving that

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43. If corporate officers or employees act for their own interests, and outside the interests of the corporation, they are legally capable of conspiring with their employer for purposes of section 1. *See* Johnston v. Baker, 445 F.2d 424, 426-27 (3d Cir. 1971); *see also* H & B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir. 1974). In *Copperweld* the Supreme Court noted this exception but did not otherwise comment on it. 104 S. Ct. at 2741 n.15. Because the jury did not find any of the named individual defendants to be conspirators, we do not have occasion to discuss this exception further.

York had so acted, the plaintiffs had not shown the existence of a "contract, combination . . . or conspiracy."[44] The court also instructed the jury, however, that if they found that some or all of the individual defendants took action against the plaintiffs "in whole or in part in their individual capacities and motivated in whole or part by independent personal economic interests, then such individual-named defendants are, under the law, independent economic entities . . . [and therefore are] legally capable of conspiring with York Hospital or its Medical and Dental Staff." App. at 5686a.

In response to these instructions, the jury answered the following special verdict question in the affirmative:

> 11. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny or impede reasonable, fair, equal or full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss?

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44. The district court instructed the jury:

> York Hospital is a corporation and as such it can act only through its employees, officers or representatives. The York Hospital does not violate the Sherman Act if it exercises its rights through its officers and agents, which is the only medium through which it can possibly act; likewise the corporation cannot conspire with its unincorporated division here, the medical and dental staff of the York Hospital.
>
> Thus I instruct you that York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as a single entity which cannot conspire with itself.

App. at 5685a.

App. at 6247a. However, when requested by special verdict question number 13 to check the names of the defendants who so conspired, the jury checked only the single name: "York Hospital Medical and Dental Staff."[45] On the basis of these answers, the district

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45. Special Verdict No. 13 took the following form:

> 13. If your answer to the previous question is "yes," check the name or names of the Defendants listed below who were involved in that conspiracy.
>
> | | |
> |---|---|
> | York Hospital | ___ |
> | York Hospital Medical and Dental Staff | X |
> | Gary Ardison, M.D. | ___ |
> | Thomas L. Bauer, M.D. | ___ |
> | Ivan L. Butler, M.D. | ___ |
> | S.W. Deisher, M.D. | ___ |
> | Jack A. Kline, M.D. | ___ |
> | Lois Kushner, M.D. | ___ |
> | S. Philip Laucks, M.D. | ___ |
> | Harold H. MacDougall, M.D. | ___ |
> | Iain L. MacKenzie, M.D. | ___ |
> | John P. Whiteley, M.D. | ___ |

App. at 6250a. It would appear that since the court instructed the jury that the hospital was one in the same with the medical staff and that therefore it was legally impossible for the two to conspire, it was internally inconsistent to provide one space to be checked for York Hospital and a separate space for the York Hospital Medical and Dental Staff.

The jury also believed that the defendants had conspired against plaintiff Weiss:

> 7. Did any of the Defendants conspire with any other person or persons, entity or entities, whether or not a Defendant, to deny Plaintiff Weiss staff privileges at the York Hospital because Weiss was an osteopathic physician?
>
> Answer: Yes.

court held the defendant medical staff liable to the plaintiff class under section 1. On the question who conspired with the medical staff, the court stated only:

> The York Hospital Medical and Dental Staff conspired with another person or entity to deny or impede reasonable, fair, equal, and full access to staff privileges at York Hospital by osteopathic physicians other than Plaintiff Weiss.

Weiss, 548 F. Supp. at 1051 (finding of fact No. 8).[46]

The defendants appeal the district court's finding that there was a "conspiracy." They note that all the individual defendants and the hospital itself were exonerated from liability under section 1, and that because "there is no evidence in the record identifying any possible 'co-conspirator'" other than the individual defendants and the hospital, the finding that the medical staff engaged in a "conspiracy" is erroneous.[47]

App. at 6243a. However, because the jury concluded that the conspiracy against Weiss did not unreasonably restrain interstate commerce, Special Verdict No. 8, the jury was not required to answer Special Verdict No. 10, which asked them to identify the conspirators.

46. Based on the jury's answers to Special Verdict Nos. 13 & 8, the court in its conclusion of law No. 5 stated: "The individual Defendants have not violated the antitrust laws." *Weiss*, 548 F. Supp. at 1061.

47. Whether antitrust defendants have engaged in a "contract, combination or conspiracy" to restrain trade is a question of fact. *See* Theatre Enterprise v. Paramount Film Distributing Corp., 346 U.S. 537, 541-42 (1954); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939). If there is evidence supporting the jury's finding of a conspiracy, we must affirm. *See* Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

The plaintiffs cross-appeal arguing that the district court's jury instruction concerning the capacity of the medical staff to conspire with itself and with York hospital was erroneous.

We agree with the plaintiffs that, as a matter of law, the medical staff is a combination of individual doctors and therefore that any action taken by the medical staff satisfies the "contract, combination, or conspiracy" requirement of section 1. Any error created by the district court's jury charge on the requirements for a "conspiracy," however, was harmless because the jury found that a conspiracy did exist. In addition, because the medical staff itself is a combination as a matter of law, we conclude that the absence of evidence of any other co-conspirator(s) is irrelevant. We do, however, agree with the district court that the hospital cannot legally conspire with its medical staff.

Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form. *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731, 2738, 2739-40, 2744 (1984); *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-228 (1947); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360-61, 376-77 (1933).[48] The "substance" of an arrangement often depends on the economic incentive of the parties. The York medical staff is a group of doctors, all of whom practice medicine in their

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48. Utilizing this principle, the Supreme Court, in *Copperweld*, explained why a corporation and its wholly owned subsidiary could not legally conspire:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate: their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the

individual capacities, and each of whom is an independent economic entity in competition with other doctors in the York medical community. Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members. Under these circumstances, the medical staff cannot be considered a single economic entity for purposes of antitrust analysis.

In the past, the Supreme Court has had occasion to address the problems created by cooperative ventures among otherwise competing entities in a single market. *See Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press v. United States*, 326 U.S. 1 (1945). Both the AP and NYSE are organizations which serve an economically useful purpose: the AP allows smaller newspapers to combine their resources for the purpose of collecting, assembling, and distributing news; NYSE provides an organized market for the purchase and sale of securities. Yet in both cases, the fact that the defendant organization was a combination of otherwise competing entities was deemed sufficient to satisfy the "contract, combination, . . . or conspiracy" requirement of section 1.[49]

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control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Copperweld, 104 S.Ct. at 2742.

49. In Associated Press v. United States, 326 U.S. 1 (1945), the Court did not discuss, and indeed seemed to think it was indisputable that the requisite joint action for section 1 purposes was present. However the Court did expressly state that:

Two recent Supreme Court cases reaffirm that a single entity made up of independent, competing economic entities satisfies the joint action requirement of Sherman Act section 1. In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), the defendants, the Maricopa Foundation for Medical Care and the Pima Foundation for Medical

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> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity": such hampering of business rivals can only be attributed to that which really makes it possible - the collective power of an unlawful combination.

326 U.S. at 15 (emphasis in original). In Silver v. New York Stock Exchange, 373 U.S. 341 (1963), the Court, on the issue of joint action, stated only:

> The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market.

373 U.S. at 347.

We acknowledge that there are factual distinctions between *Silver* and *Associated Press* on the one hand, and this case on the other. York Hospital is more than simply an association of doctors: it is a separate economic entity which provides services separate from those provided by the doctors on the medical staff. This case, however, involves only the question of the medical staff's decision about which doctors would be allowed to practice at York. For these purposes, we believe that the principles of *Silver* and *Associated Press* are applicable.

Care, were non-profit Arizona corporations composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. The Foundations were "organized for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans." *Id.* at 339. The Court simply assumed without discussion that the actions of each foundation satisfied the "contract combination . . . or conspiracy" element of section 1. Similarly, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the defendant, an association of professional engineers organized to deal with "the nontechnical aspects of engineering practice," *id.* at 682, had adopted an ethics canon prohibiting competitive bidding. Once again the Court simply assumed, without discussion, that the defendant was a combination of its members. *See also Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 479-481 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (Blue Shield of Virginia deemed an agent under the direction and control of its member physicians, and therefore its actions were that of a "combination" for section 1 purposes).

On the basis of these cases, we believe that the actions of the York medical staff are the actions of a combination of the individual doctors who make it up. In substance, the medical staff is a group of individual doctors in competition with each other and with other physicians in the York MSA, who have organized to regulate the provision of medical care at York hospital. Where such associations exist, their actions are subject to scrutiny under section 1 of the Sherman Act in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors.

The foregoing summary does not, however, end our discussion on this point, for we must consider whether errors in the district court's charge harmed any of the parties. The district court instructed the jury that "York Hospital and the Medical and Dental Staff of York Hospital must be regarded by you as a matter of law as a single entity which cannot conspire with itself." App. at 5685a. To the extent that this instruction indicates that the medical staff must be considered a single entity for antitrust purposes, it is at variance with our holding that the medical staff is a combination of the individual doctors who make it up. The plaintiffs, however, were not harmed by this error. In answer to the special verdict questions propounded by the trial judge the jury found that a conspiracy did exist, but that the medical staff was the only defendant that participated. *See supra* note 45 and accompanying text. Since the legal result of this finding is identical to that of our conclusion that the medical staff is a "combination," the district court's error was harmless.[50]

Finally, we deal with the plaintiffs assertion that the district court erred in charging the jury that the hospital could not conspire with its medical staff. The district court found that the medical staff was an unincorporated division of the hospital, and as such the court determined that the two could not conspire. Although we do not necessarily agree with the district court's characterization of the medical staff as an unincorporated division of the hospital, we agree with

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50. We also reject the defendants' argument that because the jury exonerated all defendants except the medical staff of conspiracy, and because there was no evidence of any other possible conspirator, the jury's section 1 verdict cannot stand. Because the medical staff itself is a combination within the meaning of section 1, no other co-conspirators are required for section 1 liability.

its basic conclusion that, with respect to the issues in this case, the hospital could not, as a matter of law, conspire with the medical staff. The medical staff was empowered to make staff privilege decisions on behalf of the hospital. As such, with regard to these decisions, the medical staff operated as an officer of a corporation would in relation to the corporation. Although the members of the medical staff had independent economic interests in competition with each other, the staff as an entity had no interest in competition with the hospital. Accordingly, we conclude that the district court correctly charged the jury that there could not be a conspiracy between the hospital and the medical staff. *But see Antitrust and Hospital Privileges*, *supra* note 4, at 639-40.[51]

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51. In this article the authors examine the role of medical staff members in relation to the hospital and conclude that these physicians should be treated as "outside agents" of the hospital and thus capable of conspiring under the antitrust laws:

> Attending physicians, however, are independent contractors with the hospital for other legal purposes and most of them also provide ambulatory services that are outside the scope of their hospital roles. Such independent physician behavior suggests that the relationship between medical staff members and a hospital is more analogous to the relationship between a corporation and its "outside agents" -- lawyers, accountants, advertising firms, and consultants -- than to the relationship between a corporation and its salaried employees. Physicians thus may be treated as "outside agents" of the hospital, if not as independent enterpreneurs. Significantly, the precedents are clear that outside agents are separate enough from the corporations they do business with to be treated as co-conspirators under the Sherman Act. Moreover, in the case of physician cartel decisions, there is no independent interest of the hospital, and thus the intraenterprise conspiracy defense would seem to be

2. *Proof of Restraint of Trade*

a. *Introduction*

Read literally, Section 1 prohibits every agreement "in restraint of trade." In *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898), the Supreme Court recognized that Congress could not have intended a literal interpretation of the word "every," and since *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), courts have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition.[52]

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entirely spurious. The physicians are not acting even arguably as agents, but rather as entirely independent actors who desire to use the hospital for their own anticompetitive purposes.

Id. (footnotes omitted). Some commentators have suggested the creation of a rebuttable presumption of agreement between the hospital and the medical staff. *See Antitrust and Hospital Privileges*, *supra* note 4, at 642; Note, *A Suggested Role for Rebuttable Presumptions in the Antitrust Restraint of Trade Litigation*, 1972 Duke L.J. 595, 605-624. These authors focus on the relationship between the hospital and the members of its medical staff. We focus instead on the relationship between the entities (individual doctors) who make up the medical staff, and conclude that it is they who provide the requisite joint action element for a section 1 violation.

52. Justice Brandeis provided the classic statement of the rule of reason in Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To

The courts have also, however, applied a rule of *per se* illegality to certain types of business practices. The development of *per se* rules has resulted from a recognition that the case-by-case approach inherent in the rule of reason has significant costs,[53] and that certain types of business practices almost always have anticompetitive effects without offsetting pro-competitive effects. In applying the *per se* rules, a court eschews the ordinary evaluation of the effect of the challenged practice, and concentrates instead on the question whether the practice falls within one of the categories of practices condemned by the *per se* rule. In this case, the plaintiffs argued that the actions of the

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determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied: its condition before and after the restraint was imposed: the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse: but because knowledge of intent may help the court to interpret facts and to predict consequences.

53. These costs are a product of the detailed factual analysis necessary to evaluate the myriad of business practices challenged under the antitrust laws. Litigation of the effect or purpose of a practice often is extensive and complex. Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5 (1958). Judges often lack the necessary expert understanding of market structures and behavior to make accurate determinations about a practice's effect on competition. United States v. Topco Associates, Inc., 405 U.S. 596, 609-10 (1972). One result of the specific nature of a determination under the rule of reason is that prior adjudications may provide little certainty or guidance about the legality of a practice in another situation. *Id.* at 609 n.10; *Northern Pacific Ry. Co.*, 356 U.S. at 5.

defendants were the equivalent of a boycott, or as it is sometimes called, a concerted refusal to deal, and thus illegal *per se*.[54] We now turn to that inquiry.

b. *Is Defendants' Exclusionary Conduct the Equivalent of a Concerted Refusal to Deal ("Boycott")?*

The jury found that the defendants had engaged in a policy of discrimination against Dr. Weiss and the other D.O.s in the York MSA by applying unfair, unequal, and unreasonable procedures in reviewing their applications. *Weiss*, 548 F. Supp. at 1051 (findings of fact Nos. 5-8). In addition, the district court concluded that this unfair, unreasonable, and unequal treatment "could reasonably be anticipated [by the defendants] to cause osteopathic physicians to refrain from applying for staff privileges at the York Hospital." *Weiss*, 548 F. Supp. at 1053 (finding of fact No. 31).[55] The question before us is whether these actions should properly be characterized as a "group boycott" or "concerted refusal to deal,"[56] in which case

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54. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." Northern Pacific Ry. Co. v. United States, 356 U.S. at 5 (citations omitted). *See* United States v. Columbia Steel Co., 334 U.S. 495, 522-23 (1948); Malley-Duff & Associates, Inc. v. Crown Life Ins. Co., 734 F.2d 133, 140 (3d Cir. 1984); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979).

55. These findings are clearly not "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Dawson v. Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)(quoting Denneny v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969)), and therefore we affirm them.

55. We use these two terms interchangeably. Professor Sullivan has pointed out that each term has its advantages and disadvantages: "boycott" is cryptic and emotionally

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they are illegal *per se* under section 1. *See United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). If the defendants' actions cannot be so characterized, the rule of reason analysis would apply and the outcome of the case could be different. *But see infra* note 61. We conclude that the defendants' actions, as found in the district court, are the equivalent of a concerted refusal to deal.

The classic example of a concerted refusal to deal is the situation in which businesses at one level of production or distribution, e.g., retailers, use the threat of a boycott to induce businesses at another level, e.g., manufacturers, not to deal with competitors of the retailers. As Professor Sullivan has observed, "The boycotting group members, in effect, say to their suppliers or to their customers, 'If you don't stop dealing with non-group members, we will stop dealing with you.' If continued trade with group members is more important to a supplier or customer than is trading with non-group members, this threat will be effective." L. Sullivan, *Handbook of the Law of Antitrust* § 83, at 230 (1977).[57]

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charged, but "concerted refusal to deal" is imprecise and in some respects too narrow and in other respects too broad. *See* L. Sullivan, *Handbook of the Law of Antitrust* § 83, at 231 (1977).

57. If the businesses are controlled at both levels by the same firm, and the divisions at one level of production urge the parent corporation not to deal with their rivals, there is no "concerted refusal to deal" under section 1. *Copperweld*, 104 S. Ct. 2731 (1984); *supra* note 48. In this situation, the

In this case York is a provider of hospital services: for the purpose of our analysis, the equivalent of the manufacturer in the example of a classical boycott. Similarly, the M.D.s are the equivalent of the retailers in the example, in the sense that physicians require access to a hospital in order to effectively treat patients. The difficulty with this analogy, at first blush, is that there is no evidence that the M.D.s have used coercion for the purpose of inducing York to exclude their competitors, the D.O.s. Upon closer analysis, however, the absence of coercion is irrelevant. A boycott is not

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law assumes that the vertically integrated firm will choose to maximize the profits of the firm as a whole. If the firm can reap a larger profit by selling to or buying from both its subsidiaries on a particular level of production or distribution and their competitors, it will have no incentive to refrain from doing so. The subsidiaries are not in a position to "boycott" their parent: therefore, there can be no coercive behavior by subsidiaries to force a parent to make a decision that is not in the best interests of the company as a whole. As a result, the "concerted refusal to deal" doctrine does not apply in the context of a subsidiary attempting to influence a parent's behavior.

This case can be viewed as presenting the question whether the relationship between York Hospital and the M.D.s is like a parent-subsidiary relationship, or more closely akin to a traditional boycott. But the rationale for treating the parent-subsidiary relationship differently -- that the subsidiaries cannot pressure the parent to act against its own interests -- does not apply where independent economic entities such as the M.D.s on the medical staff control the staff-privileges decision-making of an entity -- York -- at another level of production. Therefore we conclude that this case does not involve a parent-subsidiary relationship. We note, in this regard, our cognizance of the fact that the staff-privileges decision of the medical staff is subject to ultimate review by the Hospital Board. However, given the dominant role of the medical staff and the limited nature of the review process in that area, *see supra* typescript at pp. 16-23, we believe that the jury's findings as to the culpability of the medical staff are supported.

illegal under the antitrust laws because of opposition to the use of coercion, but because it involves the use by businesses of an existing relationship with a supplier to exclude competition. In the paradigm case, coercion is necessary to induce the supplier not to deal with the competitors. In this case, because of the M.D.'s control over York's admission decisions, no coercion is necessary. The underlying antitrust violation is the same: a group of firms at one level of distribution, i.e., the doctors' level, have used their existing relationship with a supplier to exclude their competitors from dealing with the supplier.[58]

We recognize that the facts of this case do not precisely fit into the mold of the classical refusal to deal. The refusal to deal is less than total insofar as York admitted Dr. Zittle and a number of other osteopaths. *See supra* note 13 and *infra* note 76. Arguably then, what is at issue is not a boycott but mere discrimination, which sounds less like a *per se* antitrust violation. However, given the evidence of the different standards applied to osteopaths and M.D.'s and the second class citizenship afforded D.O.'s upon

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58. We note that in this case York possesses monopoly power in the York MSA with respect to inpatient hospital health care services. *See infra* text accompanying notes 71-72. We therefore need not reach the question whether, in order to constitute a *per se* illegal boycott, a conspiracy to exclude a group of potential competitors from hospital staff privileges requires that the hospital -- i.e., the entity at the other level of "production" -- possess substantial market power in the relevant market. This distinguishing factor might render the analysis in this case different from the analysis in a large metropolitan area. *Cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S.Ct. 1551, 1559 (1984)("According, we have condemned tying arrangements [only] when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market.")

admission to staff privileges at York, and in view of the adverse impact of these factors upon D.O. applications for York staff privileges, we are satisfied that the restrictive policy is, in purpose and effect, sufficiently close to the traditional boycott, that the characterization is appropriate.

The Medical Staff is, however, entitled to exclude individual doctors, including osteopaths, on the basis of their lack of professional competence or unprofessional conduct. *See infra* note 60. If York's policy toward D.O.'s could be viewed as a form of industry self-regulation of this type, the rule of reason, rather than a *per se* rule, would be applicable. *See generally* L. Sullivan, *Handbook of the Law of Antitrust* §§ 86-88 (1977).[59] We recognize, therefore, that in many cases involving exclusion from staff privilege, courts will, more or less openly, have to utilize a rule of reason balancing approach. This case is different, however, because York has not contended that osteopaths as a group are less qualified than M.D.s. *See supra* note 4. In the absence of such a contention, or another legitimate explanation for the discrimination, we conclude that a *per se* rule should be applied, since the effect of the practice is identical to that of the traditional boycott, and plainly anti-competitive.

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59. As Professor Sullivan notes in his treatise, the initial question in "industry self-regulation" cases is whether the challenged restrictions have the "purpose and effect" of a classical boycott, and the scope of this initial analysis can be "so spacious that it matters little whether the inquiry is described as one aimed at determining whether a *per se* rule governs or as one in which the rule of reason is being applied, so that a judicial conclusion that 'this is a boycott and the *per se* rule governs' is very much the same as saying, 'considering everything this joint action is unreasonable.'" *Id.* § 88, at 248.

Congruent with the foregoing discussion, the Supreme Court has adopted an exception to application of the *per se* rule of illegality where the case involves a learned profession and where the restriction is justified on "public service or ethical norm" grounds. Thus unlike most cases where characterization of some activity as a classical boycott ends the inquiry, here, because the medical profession is involved, the rule of reason analysis may still control, as a "built-in" exception. We now turn to a discussion of this potential "escape hatch" to see if it can extricate the defendants from the "cut" of the *per se* rule.

c. *The "Learned Profession" Exception*

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975), in which the Supreme Court made clear that the medical profession is not exempt from the antitrust laws, the Court stated that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978). In *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-49 (1982), the Court partially explained this exception by stating that conduct which is normally subject to *per se* condemnation under section 1 will instead be subject to rule of reason analysis where the challenged conduct is "premised on public service or ethical norms." *Id.*[60] In *Maricopa*, because the

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60. In the *Professional Engineers* case, the Supreme Court stated:

> We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and,

> accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad: we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

435 U.S. at 696 (footnote omitted). In the light of the Supreme Court's subsequent decision in *Maricopa County*, *see* text, we read *Professional Engineers* to hold that where an "ethical norm" of a learned profession is under attack on section 1 grounds, a rule of reason analysis governs even if the *per se* rule might otherwise apply, but that in order to prevail on the rule of reason inquiry the defendant must demonstrate that the challenged conduct has a pro-competitive effect. *Cf. Antitrust and Hospital Privileges*, *supra* note 4, at 644-45 n. 239 (commentators differ on whether *Professional Engineers* applied the rule of reason or the *per se* approach).

We add that the defendants adduced certain evidence that tended to show that Dr. Weiss was boisterous and discourteous to nurses in areas of the hospital where patients might have overheard and have been disturbed. *See supra* note 18. Although this evidence was not the central focus of the trial -- the major issue was whether the defendants applied two levels of scrutiny to applicants: a very deferential review to M.D. applicants and a substantially more rigorous review of osteopathic applicants -- we do not doubt that a hospital could exclude an applicant from staff privileges either because he is not medically qualified or because of unprofessional conduct, so long as the hospital applies the same standards to all applicants. This result does not skew our antitrust

defendants did not attempt to justify their price fixing arrangements on either of these grounds, but instead attempted to argue that the maximum price levels were pro-competitive, the Court held that the *per se* rule controlled and consequently found that the defendants' conduct violated section 1.

In this case the defendants have offered no "public service or ethical norm" rationale for their discriminatory treatment of D.O.s. Indeed, their defense at trial was that they did not discriminate against D.O.s. Since the jury believed otherwise, we

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analysis. First, as to medical ability, restricting staff privileges to doctors who have achieved a specified level of medical ability falls within the scope of a hospital's "public service" function, and therefore the rule of reason analysis, not the *per se* rule of illegality, would control. Applying the rule of reason analysis, it seems obvious that by restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of the medical care that it delivers. Thus such action is pro-competitive and, therefore, permissible under the rule of reason. *See infra* note 61. The analysis for professional conduct is basically identical. The "public service" function of a hospital is to provide for effective and efficient medical treatment for its patients. One factor in the effective and efficient running of a hospital is a medical staff that can work together and be courteous to patients and staff. Doctors who have a history of trouble in interpersonal relations can legitimately be excluded because, if admitted, they will reduce the effectiveness of the medical staff, thereby reducing the ability of the hospital to provide top-flight service. In sum, doctors who have trouble getting along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and, therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.

See generally Dolan & Ralston, *supra* note 4, at 719, 735.

conclude that the *per se* rule governs this case,[61] except to the extent that the defendants may defend as to the damage claims of Weiss or any class member on grounds of lack of professional capacity or unprofessional conduct.

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61. Several circuit court opinions have held the rule of reason analysis, not the per se rule of illegality, controls in boycott cases involving the learned professions. We believe these cases are readily distinguishable from the instant case. In Wilk v. American Medical Ass'n., 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 2399 (1984), a case involving the refusal of M.D.s to deal with chiropractors, the Seventh Circuit stated: "boycotts are illegal *per se* only if used to enforce agreements that are themselves illegal *per se* -- for example price fixing agreements." *Id.* at 221 (quoting Marrese v. American Academy of Orthopedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983), *on rehearing*, 726 F.2d 1150 (7th Cir.), *cert. granted*, 104 S.Ct. 3553 (1984)). Since the court could find no *per se* illegal purpose for the A.M.A.'s medical ethics principle 3, which in essence provided that M.D.'s should not associate with chiropractors, it concluded that the rule of reason analysis governed in that case. We believe that the Seventh Circuit was correct in utilizing a rule of reasons analysis in the *Wilk* case because the defendants were plainly asserting a "public service or ethical norm" justification for their concerted refusal to deal with chiropractors. In Virginia Academy of Clinical Psychologists v. Blue Shield of Va., 624 F.2d 476, 484-85 (4th Cir. 1980), the Fourth Circuit stated: "Because of the special considerations involved in the delivery of health services, we are not prepared to apply a *per se* rule of illegality to medical plans which refuse or condition payments to competing or potentially competing providers." First, we note that the Fourth Circuit did not have the benefit of the Supreme Court's opinion in *Maricopa* when it decided *Virginia Academy*, and indeed the court cited the Ninth Circuit's opinion in *Maricopa*, which was subsequently reversed by the Supreme Court, as support for its decision that the rule of reason governed. Second, a "medical necessity" justification was apparently raised by the defendants, and in our view that would have been sufficient to bring the defendants within the purview of *Maricopa*'s exception for conduct based on "public

d. *The District Court's Charge and the Sherman Act Section 1 Verdict as to Weiss*

As we have explained, the case was submitted to the jury on special interrogatories, and, based thereon, the district court made certain findings based theron and granted injunctive relief. Because of our rulings on appealability, *see supra* Part III B, we ultimately review

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service or ethical norms."

Finally, in Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984), the D.C. Circuit Court held that the rule of reason analysis governed a section 1 challenge to a rule promulgated by the American Academy of Periodontology (AAP) that limited membership in the AAP to licensed dentists who practice periodontics exclusively, and who do not practice other forms of dentistry. The court labeled the effect of the AAP's rule a "group boycott" but concluded that "[w]hen a conspiracy of this sort is alleged in the context of one of the learned professions, the nature and extent of its anticompetitive effect are often too uncertain to be amendable to *per se* treatment." *Id.* at 1492. We believe the "boycott" involved in the *Kreuzer* case is not a classical boycott, in that a group of conpetitors at one level of production -- i.e., the periodontists -- were not trying to use their position to coerce some entity on some other level of production to discriminate against competitors of the periodontists, and therefore *Kreuzer* is inapposite to the facts of the instant case.

Even if we were to conclude that a rule of reasons analysis governs in this case simply because a learned profession is involved, we would conclude that the defendants' conduct here was an unreasonable restraint because: (1) Weiss met his burden of production and persuasion that the purpose and effect of the defendants' discriminatory conduct was to "foreclose so much of the market from penetration by [the M.D.s'] competitors [i.e., the D.O.s] as to unreasonably restrain competition in the affected market, the market for [inpatient medical care]." *see* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1568 n.51 (1984), and (2) the defendants -- who relied solely on the defense they had not discriminated against D.O.s -- made no attempt to counter this evidence.

here. in terms of the plaintiffs' section 1 claims. only the injunctive order. We conclude that a *per se* analysis. coupled with the district court's findings. provide the substantive basis for the issuance of an injunction under section 1 of the Sherman Act in favor of the class and that. as a matter of law. there is no grounds for distinguishing Weiss and the class under section 1 *for purposes of injunctive relief.* The district court entered an injunction in favor of both Weiss and the class. but held that Weiss was entitled to relief under section two. Although we reverse that holding. *see infra* part IV.B.. we conclude that Weiss was entitled to injunctive relief under section 1.

The question of whether Weiss or any class member is entitled to damages. however. is in no way settled by our conclusion. In the trial on the question of damages. the defendants may raise the defenses relating to individual osteopaths. including the demand the demand requirement defense as to members of the class. *see supra* notes 30. 32. and the defense of lack of professional competence or character as to both Weiss and the class. This is so even though. as we have explained. no such defense has been interposed as to osteopaths generally. thus facilitating our disposition of the injunctive relief claim under section 16. *See supra* at Part III C 1.

We must also address the question whether the professional competence and character issue has already been resolved by the jury's verdict with regard to Weiss. This requires a consideration of the relevant portion of the district court's charge. The court charged that a combination rule-of-reason/*per-se* analysis applied to defendants' conduct:

> Among the practices which the courts have deemed to be unlawful in and of themselves --

that is the *per se* quality -- are group boycotts or concerted refusals to deal.

In this case it is alleged that the York Hospital and members of its Medical Staff have conspired to exclude osteopathic physicians from the staff of the hospital or obtaining access to the staff. This would be a refusal to deal, *per se* and unreasonable restraint of trade.

If you find that the Defendants while acting in concert acted to exclude osteopathic physicians from the medical staff of York Hospital or treated osteopathic physicians in a way different from allopathic physicians, or acted unreasonably with the purpose or effect of excluding osteopathic physicians from the staff of York Hospital, I then instruct you that such conduct would be an unreasonable restraint of trade as a matter of law.

. . . .

In determining whether or not a *per se* unreasonable conspiracy existed among any of the defendants as co-conspirators to refuse to deal with the Plaintiff Weiss, or the Plaintiff class, you may consider the validity of the reasons which such parties have given for any refusal to deal with the Plaintiff or the Plaintiff class.

. . . .

Even if you do not find the defendants' behavior to be *per se* an unreasonable restraint of trade, you may still find that under all the circumstances the defendants' conduct was an unreasonable restraint of trade.

App. at 5690a-5695a. Apparently applying this instruction, the jury concluded that the defendants' conduct constituted an "unreasonable restraint" as to the class, but was not an "unreasonable restraint" as to Weiss. *Weiss*, 548 F. Supp. at 1051-52 (findings of fact Nos. 7 & 9). Based on these answers, the district court concluded that the medical staff was liable for violating Sherman Act section 1 as to the class but not as to Weiss.

This conclusion is flawed, however, because the instruction was either incorrect or misleading. The instruction was incorrect to the extent that the defendants' conduct in discriminating against D.O.s as a class is subject to the *per se* rule of illegality, hence it was irrelevant whether the defendants' conduct was an unreasonable restraint as to Weiss (or the class). In that respect the question should not have been submitted to the jury. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S.Ct. 1551, 1556 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). To the extent that the charge posed to the jury the question whether it was not unreasonable to deny Weiss admission because he lacked professional competence or character, it was confusing, because the court did not properly define the relationship between the *per se* rule for concerted refusals to deal and the learned profession exception. The question of Weiss' professional competence or character, however, was neither properly nor squarely presented to the jury. The district court did not reach any conclusion arguably based on that question.[62]

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62. After the jury returned its answers, Weiss moved for judgment in his favor on the section 1 count.

Because of the confusion in the court's charge, and the lack of a specific special interrogatory to the jury, we cannot deem the issue of Weiss' professional competence and character as a defense to his claim for damages concluded. Hence, to the extent that the question was arguably resolved by the jury, we grant a partial new trial on that issue. In all other respects Weiss is entitled to the benefit of the district court's findings under section 1.

3. *Substantiality of Effect on Interstate Commerce*

In order to violate section 1 of the Sherman Act, a defendant's actions must relate to trade or commerce "among the several States."[63] There are two ways to

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notwithstanding the jury's determination that the defendants' conduct did not constitute an unreasonable restraint as to him, on the grounds that the *per se* rule of illegality should have been applied to defendants' conduct. *Weiss*, 548 F. Supp. at 1054. In response, the district court stated:

> Since Plaintiff Weiss has otherwise established liability of the York Hospital and the York Hospital Medical and Dental Staff to him under the antitrust laws, the Court need not decide at this time whether the conspiracy to deny Plaintiff Weiss staff privileges at the York hospital is in violation of the Sherman Act.

Id. The court did not include in its order any specific declaration that Weiss did not prevail as to section 1.

63. This interstate impact requirement has been construed as an element of both jurisdiction and the substantive offense under the Sherman Act. *See* Mortensen v. First Federal

satisfy this requirement: the proscribed conduct may itself be "in interstate commerce," or the conduct may be a purely intrastate activity that has a "substantial and adverse effect" on interstate commerce.[64] *See, e.g., McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976); *Cardio-Medical Associates, v. Crozer-Chester Medical Center*, 721 F.2d 68, 71 (3d Cir. 1983).

The district court focused its evidentiary inquiry on the effect on interstate commerce of *the defendants'* conduct and found the requisite "substantial and adverse" effect.[65] Both before the district court and on

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Savings & Loan Ass'n, 549 F.2d 884, 890-91 (3d Cir. 1977). The inquiry is the same for both elements. Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976); Englert v. City of McKeesport, 736 F.2d 96 (3d Cir. 1984).

64. Another formulation of the test, which apparently has the same meaning, is that the conduct must have a "not insubstantial effect" on interstate commerce.

65. At trial the plaintiff presented evidence demonstrating that York's business activities had a substantial effect on interstate commerce. York's gross patient revenue for an average year was approximately 50 million dollars. App. at 493a. The testimony indicated that York made substantial purchases of drugs and equipment in interstate commerce. App. at 4505a. In addition York routinely treated out-of-state patients and billed them at their out-of-state residences. App. at 4473a-4475a. Finally, the overwhelming majority of patient bills were paid by third party payors (i.e., private insurance companies and federal and state insurers) many of whom are located outside Pennsylvania. App. at 4473a-4475a. Based on this evidence, the jury found that: "(1) the Defendants engaged in business activities in interstate commerce. Special Verdict No. 1; (2) Defendants' conduct concerning Plaintiff Weiss and the

appeal the defendants have contended that the proper focus should have been whether the defendants' allegedly illegal conduct substantially affected *the plaintiffs'* activities in interstate commerce. The defendants concede that, if the district court was correct in focusing the inquiry on the effect of the defendants' activities, the evidence supports the jury's and court's conclusion that the effect on interstate commerce was "substantial and adverse."

The defendants' argument is premised primarily on a district court opinion, *Cardio-Medical Association, v. Crozer-Chester Medical Center*, 552 F. Supp. 1170 (E.D. Pa. 1982). Since the time of oral argument in this case, however, this court reversed that district court's opinion and held that:

> We therefore decline to adopt the district court's theory that defendants' conduct is relevant to the jurisdictional inquiry only insofar as it affects interstate commerce through the person of the plaintiff . . . . [W]e are willing to examine the defendants' conduct both as it affects interstate commerce through the person of the plaintiff and as it affects commerce independently.

Cardio-Medical Assocs. Ltd. v. Crozer-Chester Med. Ctr., 721 F.2d 68, 75 (3d Cir. 1983). Consequently, the district court was correct in focusing on the effect on

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Plaintiff class occurred in interstate commerce. Special Verdict No. 2; (3) the Defendants' conduct had a 'not insubstantial effect' on interstate commerce. Special Verdict No. 3; and (4) the Defendants' conduct concerning Plaintiff Weiss and the Plaintiff class had a 'not insubstantial effect' on interstate commerce. Special Verdict No. 4." *Weiss*, 548 F. Supp. at 1051 (findings of fact Nos. 1-4).

interstate commerce of the defendants' activities.[66] We therefore we affirm the finding of a "substantial and adverse" impact on interstate commerce in this case.

B. *Section 2 of the Sherman Act*

Section 2 reads in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . . .

15 U.S.C. § 2. The test for determining whether a defendant has monopolized in violation of section 2 has been articulated by the Supreme Court as: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). *See also Borough of Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982).[67] The district court found the defendant York liable to both Weiss and the

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66. Most of the evidence on interstate impact concerned York Hospital's activities in interstate commerce, however, only the medical staff was found liable under section 1. We conclude that this discrepancy is irrelevant because the medical staff does not exist independent of the hospital, and therefore the hospital's activities in interstate commerce are attributable to the medical staff also.

67. Section 2, like section 1, also contains the requirement that there be a substantial effect on interstate commerce; that requirement has been met in this case. *See supra* text accompanying notes 63-66.

plaintiff class for unlawful monopolization in violation of section 2. York has appealed that finding.

York contends that the jury incorrectly concluded that the appropriate market was inpatient health care services provided by hospitals and their staffs; that it incorrectly concluded that York had monopoly power in that market; and that it incorrectly concluded that York acquired or maintained that power by means of "willful" conduct. We conclude that, although there was sufficient evidence to support the jury's conclusion as to relevant market and monopoly power, there was no evidence of willful conduct designed to acquire or maintain monopoly power, and therefore the judgment against York under section 2 must be reversed.

(1) *Relevant Market*

In order to define the relevant market for purposes of a section 2 claim, it is necessary to examine two aspects of that market: the product market and geographic market. York does not challenge the jury's finding that the relevant geographic market is the York MSA. York does, however, challenge the jury's finding on the product market. In answer to special verdict question number 14, the jury found that the relevant product market was "inpatient hospital health care services supplied by hospitals and their medical staffs." *Weiss*, 548 F. Supp. at 1052 (finding of fact No. 10). Market definition is a question of fact, *Borough of Lansdale*, 692 F.2d at 311-12, and we therefore must affirm the jury's conclusion unless the record is devoid of evidence upon which the jury might reasonably base its conclusion. *See Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 28 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969).

Recognizing their substantial burden in overturning a jury's factual finding, York argues that, as a matter of law, the product market is the narrowest market that includes all competing products that consumers perceive as reasonable substitutes for each other.[68] Defendants' Brief at 40. York contends that, since the plaintiff's expert did not support his conclusion that the relevant market was inpatient hospital care with "any study or evidence of any kind that patients perceive all health care to be essentially fungible," and since it is obvious that inpatient hospital services are not fungible, the jury's finding that the relevant product market is inpatient health care is incorrect as a matter of law. *Id.* at 41.

In defining a market in an antitrust case, the fact finder must take into account the realities of competition. *See United States v. Grinnell Corp.*, 384 U.S. 563, 572-73 (1966); *United States v. Philadelphia National Bank*, 374 U.S. 321, 356-57 (1963); *see also Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). Since the purpose of market definition is to determine whether market power exists, *see* L. Sullivan, *Handbook of the Law of Antitrust* § 12 (1977), market definitions must account for all factors affecting the ability of the alleged monopolist to raise prices or restrict competition, but need not account for other factors which might affect an economist's definition of a product market.

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68. In the typical antitrust action the defendant attempts to prove the widest (and the plaintiff the narrowest) possible market. This is true because the fraction of the relevant market controlled by the defendant will usually be the most important indicator of monopoly power. Thus the larger the product market is, the larger the denominator of the equation will be, thereby decreasing the percentage of the defendant's market power and consequently the probability of establishing an offense. *See* Dolan & Ralston, *supra* note 4, at 763-764.

Defendants argue that "inpatient health care services" is not a single market, but an amalgam of numerous markets for individual types of services. Where, however, several goods or services are generally offered by the same providers, it is not unreasonable for a jury to conclude that the market for antitrust purposes includes all of those goods or services. *See Grinnell Corp.*, 384 U.S. at 572;[69] *Philadelphia National Bank*, 374 U.S. at 363. In this case, the medical staffs. App. at 3851a. The defendants' expert also testified that a patient may require several different types of services during his stay at a hospital depending on the course of his treatment. App. at 5136a-37a. The jury could reasonably have concluded based on this testimony that a consumer of hospital services makes one "purchase decision" -- where to be hospitalized -- and that further decisions concerning his treatment are relatively insulated from any

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69. In *Grinnell Corp.*, which involved "central station protection" against losses such as burglary, fire, water overflow, and the like, the defendants there made essentially the same argument as that made by defendants here:

> Defendants argue that the different central station services offered are so diverse that they cannot . . . be lumped together to make up the relevant market. For example, burglar alarm services are not interchangeable with fire alarm services.

384 U.S. at 571-72. The Supreme Court squarely rejected that argument, upholding a single service market for central alarm protection:

> But there is here a single use, i.e., the protection of property through a central station that receives signals. . . . We see no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities.

Id. at 572.

competitive effect.[70] This conclusion was clearly supported by the evidence, and therefore we affirm the jury's finding that the relevant product market was inpatient hospital health care. *See Grinnell Corp.*, 384 U.S. 563 (1966).

(2) *Monopoly Power.*

Monopoly power is defined as the ability to control price in or to exclude or restrict competition from a relevant geographic market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 26 (3d Cir. 1978), *cert. denied*, 439 U.S. 876 (1978).[71] In their answers to special verdict questions numbers 16 and 18, the jury expressly determined that York had such power. On appeal York asserts that there was insufficient evidence to support the jury's conclusion on this point. We find this contention to be without merit.

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70. On this point the district court charged the jury:

> To repeat, in this case the Plaintiffs claim that the relevant product market is that of inpatient hospital health care supplied by hospitals and their medical staffs. You must determine whether Plaintiff has carried his burden of proof that this alleged market in fact exists and is the narrowest relevant product market.

App. at 5702a.

71. This is precisely how the concept was defined to the jury in the district court's charge:

> Monopoly power is defined as the power to control prices or exclude competition in a relevant market. Therefore you must determine whether the Defendants could either control prices or exclude competition in the relevant product market.

App. at 5702a.

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A primary criterion used to assess the existence of monopoly power is the defendant's market share. *See* L. Sullivan, *Handbook of the Law of Antitrust* § 22 (1977).[72] In this case, the plaintiffs' expert testified that York possessed a market share in excess of eighty percent, and that in his expert opinion the defendants possessed "the power to exclude competition" and "the

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72. The general rule was stated by the Supreme Court in *Grinnell Corp.*:

> In United States v. E.I. du Pont de Nemours & Co., . . . we defined monopoly power as "the power to control prices or exclude competition." The existence of such power ordinarily may be inferred from the predominant share of the market. In American Tobacco Co. v. United States. . . . we said that . . . "over two-thirds of the entire domestic field of cigarettes, and * * * over 80% of the field of comparable cigarettes" constituted "a substantial monopoly." In United States v. Aluminum Co. of America. . . . 90% of the market constituted monopoly power. In the present case, 87% of the accredited central station service business leaves no doubt that the congeries of these defendants have monopoly power . . . .

384 U.S. at 571. *See also* International Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242, 249 (1959) (81% market control is sufficient to establish monopoly power); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389-90 (1956); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 33 (1911) (90% is enough); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% is enough, 60% not likely enough, and 33% not enough). The courts consider more than just the percentage of the market share in determining monopoly power. Other relevant factors that the courts have identified include: the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods on services from outside the market, and consumer demand factors. A defendant's power either by itself or aided by these other factors must be enough to restrict entry, supply, or price. *See* L. Sullivan, *Handbook of the Law of Antitrust* §§ 22-32 (1977); *see also* Dolan & Ralston, *supra* note 4, at 767.

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power to raise and control prices." App. at 3861a. Since monopoly power is a question of fact, *Borough of Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982), and since we believe that the expert's testimony and York's market share is sufficient evidence upon which the jury could reasonably have concluded that monopoly power existed in this case, we affirm the jury's and district court's finding on this point. *See Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

3. *Willful Acquisition or Maintenance of Monopoly Power*

In addition to proving monopoly power in the relevant market, an antitrust plaintiff must also show that the defendant willfully acquired or maintained that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570 (1966); *Borough of Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982).[73] The plaintiffs concede that York lawfully acquired its monopoly power; therefore, the relevant issue is whether the plaintiffs adduced sufficient evidence to demonstrate that York "willfully" *maintained* this power. The only evidence that plaintiffs offered on this point was the testimony of their expert that M.D.s have a strong economic interest in excluding in excluding D.O.s from access to York Hospital because, if D.O.s are given access to York on the same terms and

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73. This requirement represents a policy judgment that a firm that has acquired and maintained its position as a monopolist because of "growth or development as a result of superior product, business acumen, or historic accident," *id.*, and not through anticompetitive conduct, should not be liable under the antitrust laws for its success.

conditions as M.D.s. M.D.s will be forced to compete directly and on equal terms with D.O.s. This testimony is a sufficient basis on which to imply an anticompetitive purpose on the part of the M.D.s in excluding the D.O.s, but it does not explain an economic motive on the part of the hospital to discriminate against D.O.s.

On this point, the uncontradicted evidence of both the plaintiffs' and the defendants' experts was that York, like any hospital, would maximize its revenues by giving staff privileges to every qualified doctor who applied. Hospitals are in the business of providing facilities (rooms and equipment) and support staff (nurses, administrators, etc.). These resources are fixed in the short run, and the hospital maximizes its revenues by encouraging competition for its hospital beds and operating rooms. Since only physicians with staff privileges can admit and treat patients, York can maximize competition for its facilities by granting staff privileges to every qualified doctor who applies. Excluding D.O.s, on the other hand, is likely to weaken York's monopoly position in the long run, since a potential rival, such as Memorial Hospital, would have an incentive to provide competing services for the D.O.s excluded from York.

Recognizing this problem with their section 2 claim, plaintiffs assert that, although the hospital itself has no economic reason to discriminate against D.O.s, the hospital's medical staff, which as a matter of law is a single entity with the hospital, *see supra* text preceding note 51, is a combination of M.D.s, each of whom have a strong economic motive to exclude D.O.s. Thus, the plaintiffs argue, we should ascribe the anticompetitive motives of the individual M.D.s to the hospital.

There are two problems with this argument. First, the fact that the individual M.D.s who make up the medical staff have parallel anticompetitive motives was the reason we concluded that, as a matter of law, the medical staff is a combination of doctors within the meaning of section 1. We believe, however, that it would be improper to attribute the economic motive of the M.D.s to York because the M.D.'s motive is to restrict competition in a market in which York is not involved, and because in fact York's economic interest is directly contradictory to that of the individual doctors. Second, even if the anticompetitive motive of the individual doctors could be attributed to the hospital, the actions taken in furtherance of that motive have nothing to do with the maintenance of York's monopoly position: restricting the access of D.O.s to York will not aid York in maintaining that monopoly power.

In sum, we conclude that there is no evidence that York "willfully" maintained its monopoly position as the dominant provider of inpatient health care services in the York MSA. For this reason we reverse the district court's finding that York violated section 2 of the Sherman Act.

C. *The Propriety and Scope of the Injunction under Section 16 of the Clayton Act*

The final issue we must confront is the propriety and scope of the injunction granted by the district court. The defendants challenge both the propriety of injunctive relief in this case, and the scope of the injunction issued. We conclude that the issuance of an injunction was within the discretion of the district court, but that, given the fact that we have modified the district court's conclusions concerning liability of the defendants under sections 1 and 2, the district court should reexamine the scope of that injunction.

Section 16 of the Clayton Act,[74] which authorizes injunctive relief in private antitrust cases, focuses on "threatened loss or damage" resulting from a violation of the antitrust laws, and it authorizes an injunction when and under the same conditions as injunctions are granted by "courts of equity." *See Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975). Mindful of the language and purpose of section 16, courts have held that, in order to be entitled to injunctive relief, plaintiffs in an antitrust suit "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Mid-West Paper*, 596 F.2d at 591.

The jury found that both Weiss and the class had been injured by discriminatory admission practices at York,[75] and the district court adopted both of these findings. *Weiss*, 548 F. Supp. at 1051-52 (findings of fact Nos. 5 & 9). In addition, the district court expressly concluded that "absent an injunction, there is no guarantee that the injuries by the York Hospital and the York Hospital Medical and Dental Staff will abate." *Weiss*, 548 F. Supp. at 1058. Thus the district court concluded that there was a significant threat of injury from a continuing violation of the antitrust laws. *Id.* (citing *Mid-West Paper*, 596 F.2d at 594 n.85).

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74. The text of section 16 is set forth *supra* text following note 31.

75. As to Weiss, the jury concluded that "but for the fact that he was an osteopathic physician rather than an allopathic (M.D.) physician" he would have been granted staff privileges at York. Special Verdict No. 5. As to the plaintiff class, the jury concluded that the defendants' discriminatory actions "cause[d] injury to members of the Plaintiff class other than the Plaintiff in their business and property." Special Verdict No. 12.

The defendants suggest two reasons for their contention that the jury's findings that Weiss and the class were injured by the defendants' conduct are unsupported by any evidence in the record of this case. First, they claim that there is no evidence on which the jury could have based its conclusion that the medical staff discriminated against D.O.s, and therefore, if the staff did not discriminate against D.O.s, then the D.O.s could not have been injured by the staff. We have already concluded, however, that there was substantial evidence supporting the jury's conclusion of discrimination, and therefore we reject the defendants' contrary contention. Second, defendants suggest that primary care physicians, such as Weiss and the majority of the D.O. class members, do not need hospital admitting and attending privileges because they can provide their services solely by "visiting" their patients at York, and that therefore the plaintiffs were not injured by the alleged discriminatory conduct in denying them staff privileges.[76] We agree with plaintiff that:

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76. During the pendency of this class litigation, six out of the ninety-two class members applied and were accepted for staff privileges at York. Defendants contend that the admission of these six osteopaths, combined with the fact that Weiss is the only osteopath to ever be turned down for staff privileges at York, eliminated any threat of harm resulting from defendants' exclusionary conduct. The district court considered this contention and concluded that members of the plaintiff class nevertheless continued to be dissuaded from applying for staff privileges at York because of York's continued dual-track admissions policy. The court went on to find that the class' collective fear that they would not be treated equally with M.D. applications was reasonable, despite the recent trend to admit osteopathic applicants, because denial of staff privileges is a significant adverse professional event for a physician. This conclusion is not clearly erroneous. *Cf.* Zenith Radio Corp.

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> This suggestion is preposterous . . . . [A] primary care physician will frequently need to admit his patients to the hospital and participate in their hospital care. (5262a - 5265a) As the physician with greatest familiarity with a patient, he is often the best one to coordinate the varied consultations, diagnostic services and therapeutic applications necessary to track down and treat disease. (*Id.*; 5903a; 3553a; 3572a) Often, he will have primary responsibility for the hospital management of a primary disease with a specialist having the responsibility for treatment of complications. *Id.* Like the specialist, if a primary care physician is foreclosed from privileges at York Hospital, he loses the ability to admit and treat patients there and the patient income which would otherwise be attributable thereto.

Plaintiffs' Brief at 57 n.25.

Because the district court's conclusion that Weiss and the class were threatened with significant injury due to the discriminatory treatment of D.O.s at York is supported by the evidence, we conclude that the court did not abuse its discretion in granting injunctive relief pursuant to section 16.

The injunction issued by the district court in this case was tailored to prevent possible future harm to Weiss and the class resulting from further discriminatory practices at York:

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v. Hazeltine Research, Inc., 395 U.S. 100, 131-32 (1969) ("Neither the relative quiescence of the [conspiracy] during litigation nor claims that objectionable conduct would cease with the judgment negated the threat to [plaintiff's] foreign trade. That threat was too clear for argument, and injunctive relief against [defendant] . . . was wholly proper.").

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Pursuant to the Court's authority under 15 U.S.C. § 26, this Court hereby declares that the following equitable relief shall be entered against Defendants York Hospital and York Hospital Medical and Dental Staff:

1.1. The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital.

1.2 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians.

1.3 The York Hospital and the York Hospital Medical and Dental staff are restrained and enjoined from interpreting the expression "American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

Weiss, 548 F. Supp. at 1061. Our scope of review over questions of the scope of an injunction issued pursuant to section 16 is abuse of discretion. *William Goldman Theatres, Inc. v. Loew's, Inc.*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948), and it appears that the injunction entered in this case falls within allowable discretion. However, given the fact that we have modified the district court's conclusions concerning the liability of the defendants under

sections 1 and 2, we believe that the prudent course is to remand to the district court to reconsider the proper scope of injunctive relief given our decision on the sections 1 and 2 claims. Accordingly, we remand the question to the district court so that it may consider whether or not the injunction should be modified. We do, however, note our concern that certain phraseology within the order might be subject to overbroad interpretation ("full . . . access . . . to the facilities"), though we leave that matter to the district court as well.[77]

IV. *CONCLUSION*

In summary, we reach the following conclusions. First, we find that the district court's decision that the medical staff violated Sherman Act section 1 as to the plaintiff class is supported by sufficient evidence, and we therefore will affirm the district court on this point. Since we also conclude that, as a matter of law, there was no distinction between Weiss and the class for purposes of injunctive relief under section 1, we hold that Weiss was entitled to the same relief as the class on that claim. Second, since there was no evidence adduced at trial that York engaged in any willful conduct designed to acquire or maintain its monopoly power, we will reverse the district court's finding of liability in favor of Weiss and the class and against York on section 2 grounds. Third, we also agree that the issuance of an injunction by the district court in this case was proper. Although the scope of the injunction

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77. We emphasize that we have not mandated that the district court should order York to admit Dr. Weiss. The plaintiffs requested this injunctive relief and the district court refused. The district court's injunction is tailored to require that the defendants treat M.D.s and D.O.s equally. Since the defendants have publicly maintained that they do treat M.D.s and D.O.s the same, the district court's injunction hardly seems burdensome.

also appears to fall within the district court's discretion, given our modification of the district court's determinations on the liability of the defendants under Sherman Act sections 1 and 2, we will remand the case to the district court for reconsideration of the scope of the injunction in light of our opinion here.

On remand, the court will also have to try the damage claims, affording the defendants the opportunity to raise the defenses that members of the class did not make demand for staff privileges, and that any such application, including that of Weiss, was properly refused because of the doctor's lack of professional competence or character. *See supra* note 18. To the extent that the district court may have addressed the latter question with respect to Weiss in its findings and judgment, we grant a partial new trial. Finally, although we did not address the question in the text, we have concluded, *see supra* note 29, that the district court's decisions absolving various of the defendants on various of the claims, which decisions are based on the jury's answers to the special verdict questions, are supported by the evidence, and we therefore will affirm them.[78]

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78. Defendants have requested that on remand the matter be reassigned to a different judge. We see no basis for so exercising our supervisory powers.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action #80-0134

Complaint Filed 2/6/80
(Judge Muir)

MALCOLM WEISS,

Plaintiff,

vs.

YORK HOSPITAL, et al.,

Defendants.

OPINION AND ORDER OF SEPTEMBER 30, 1982

MUIR, District Judge

I. Introduction.

Plaintiff Malcolm Weiss, individually and on behalf of the class of all osteopathic physicians practicing in the York Medical Service Area filed this action for injunctive relief and monetary damages under the federal antitrust laws, 15 U.S.C. §§ 1, 2, 15, 26, as well as under state law on February 6, 1980. An amended complaint was filed on June 2, 1982 in which Weiss named as Defendants the York Hospital, the York Hospital Medical and Dental Staff, and individual defendants Gary Ardison, M.D., Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., Jack A. Kline, M.D., Lois Kushner, M.D., S. Phillip Laucks, M.D., Harold H. MacDougall, M.D., Iain L. MacKenzie, M.D., and John P. Whiteley, M.D. (sometimes hereinafter collectively referred to as "the Defendants").

On May 4 and 5, 1981, this Court held a hearing with respect to Weiss's motion for class action certification. Thereafter, on May 28, 1981, this Court granted Weiss's motion for class certification and the Court certified the class to consist of all osteopathic physicians practicing medicine within the York Medical Service Area (hereinafter referred to as "the Plaintiff Class").

After several delays, caused in part by petitions to the Court of Appeals for Writs of Mandamus and Prohibition filed by the Defendants and certain non-party physicians from whom Plaintiff Weiss and the Plaintiff Class (sometimes hereinafter referred to as "the Plaintiffs") sought discovery, *e.g. DeMasi v. Weiss,* 669 F.2d 114 (3d Cir. 1982) the liability phase of this trial was ultimately scheduled for trial on the Court's August, 1982 Harrisburg-Lewisburg list for trial. On August 4, 1982, the jury in this case was selected at the United States Courthouse in Lewisburg, Pennyslvania. Pursuant to a request of all parties and for the convenience of the parties, witnesses and counsel, the Court agreed to hold the trial of this case in Williamsport, Pennsylvania.

The trial of this action commenced on August 11, 1982. On September 1, 1982, a 12-member jury returned unanimous answers to 40 special verdict questions. Thereafter, the Defendants requested the opportunity to present additional evidence to the Court, sitting without a jury, on the question of whether equitable relief should issue under Section 16 of the Clayton Act, 15 U.S.C. § 26. On September 14, 1982, this Court held a hearing with respect to the issue of equitable relief. Following are the Court's findings of fact, discussion, conclusions of law, and order regarding the request of Plaintiff Weiss and the Plaintiff Class for equitable relief.

II. Findings of Fact.

1. The Defendants engaged in business activities in interstate commerce (Special Verdict Question No. 1) (hereinafter "S.V. —").

2. The Defendants' conduct concerning Plaintiff Weiss and the Plaintiff class occurred in interstate commerce (S.V. 2).

3. The Defendants' conduct in general had a "not insubstantial" effect on interstate commerce (S.V. 3).

4. The Defendants' conduct concerning Plaintiff Weiss and the Plaintiff class had a "not insubstantial" effect on interstate commerce (S.V. 4).

5. Plaintiff Weiss would have been granted staff privileges at the York Hospital but for the fact that he was an osteopathic physician rather than an allopathic physician (S.V. 5).

6. The procedures utilized by the Defendants in denying Plaintiff Weiss's application for staff privileges at the York Hospital were unfair taken as a whole (S.V. 6).

7. At least one Defendant conspired with another person or entity to deny Plaintiff Weiss staff privileges at the York Hospital because Weiss was an osteopathic physician but that conspiracy did not constitute an unreasonable restraint upon interstate commerce (S.V. 7. 8).

8. The York Hospital Medical and Dental Staff conspired with another person or entity to deny or impede reasonable, fair, equal, and full access to staff privileges at the York Hospital by osteopathic physicians other than Plaintiff Weiss (S.V. 11, 13).

9. The conspiracy referred to in the previous paragraph constituted an unreasonable restraint upon interstate commerce and caused injury to members of the Plaintiff Class other than plaintiff Weiss in their businesses and property (S.V. 11.5, 12).

10. A relevant product market for the provision of inpatient hospital health care services supplied by hospitals and their medical staffs has been established (S.V. 14).

11. The York Medical Service Area is the relevant geographic market for the provision of inpatient hospital health care services provided by the Defendants (S.V. 15).

12. The York Hospital had the power to control prices in and exclude competitors from the relevant market (S.V. 16, 17, 18, 19).

13. The York Hospital Medical and Dental Staff had the power to control prices in the relevant market (S.V. 16, 17).

14. The York Hospital Medical and Dental Staff had no power to exclude competitors from the relevant market (S.V. 18, 19).

15. No other Defendant had the power either to control prices in or exclude competitors from the relevant market (S.V. 16, 17, 18, 19).

16. The York Hospital unreasonably exercised the power either to control prices in or exclude competitors from the relevant market to exclude Plaintiff Weiss from York Hospital Staff privileges and thereby caused injury to Plaintiff Weiss in his business or property (S.V. 20, 21, 22).

17. The York Hospital unreasonably exercised the power either to control prices in or exclude competitors from the relevant geographic market to exclude osteopathic physicians from the York Hospital Staff and thereby caused injury to members of the Plaintiff Class, other than Plaintiff Weiss, in their businesses or property (S.V. 23, 24, 25).

18. The York Hospital had the specific intent and purpose to acquire the power to control prices in or to

exclude competitors from the relevant market (S.V. 26, 27).

19. No other Defendant had the intent or purpose referred to in the preceding paragraph (S.V. 26, 27).

20. The York Hospital did acts directed to accomplishing a monopoly in the relevant market (S.V. 28, 29).

21. No other Defendant did such acts referred to in the preceding paragraph (S.V. 28, 29).

22. The York Hospital had a dangerous probability of achieving monopoly power in the relevant product and geographic markets (S.V. 30, 31).

23. The conduct of the York Hospital referred to in the preceding paragraph caused injury to Plaintiff Weiss and members of the Plaintiff Class in their businesses or property (S.V. 32, 33).

24. No other Defendant had a dangerous probability of achieving monopoly power in the relevant market (S.V. 30, 31).

25. The York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. conspired with other persons or entities to obtain the power to control prices and exclude competitors from the relevant market (S.V. 34, 35, 36).

26. Plaintiff Weiss and members of the Plaintiff Class were injured in their businesses or property as a result of the conspiracy referred to in the preceding paragraph (S.V. 37, 38).

27. No other Defendant conspired to obtain the power either to control prices in or exclude competitors from the relevant market (S.V. 34, 35, 36).

28. The York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, and Lois Kushner, M.D., intentionally interferred, without proper cause, with Plaintiff Weiss's contracts with other persons thereby substantially causing injury to Plaintiff Weiss (S.V. 39, 40, 41).

29. The denial of hospital staff privileges to a physician or the revocation of such privileges is a serious adverse professional event which is likely to besmirch the professional reputation of such a physician.

30. The practices of the York Hospital, the York Hospital Medical and Dental Staff, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. (hereinafter "these Defendants") which discriminated against osteopathic physicians threaten to result in the exclusion of osteopathic physicians in the York Medical Service Area from access to the services and facilities provided by York Hospital.

31. Discrimination by these Defendants against osteopathic physicians could reasonably be anticipated to cause osteopathic physicians to refrain from applying for staff privileges at the York Hospital.

32. Without staff privileges, a physician cannot admit, effectively follow, or treat patients at the York Hospital.

33. York Hospital has a number of unique services and facilities not available to patients and physicians at any other hospital within the York Medical Service Area.

34. As a result of York Hospital's possession of unique services and facilities, osteopathic physicians lacking staff privileges at York Hospital have been required, if they desired to have their patients treated locally, to

refer their patients to allopathic physicians who are members of the York Hospital Medical and Dental Staff for treatment at York Hospital.

35. If osteopathic physicians were permitted access to the services and facilities of York Hospital by affording them staff privileges, and were permitted to admit, follow, and treat their patients at York Hospital, the osteopathic physicians would be less likely to lose patients to their allopathic competitors.

36. Since 1976, eight osteopathic physicians have applied for York Hospital staff privileges.

37. Of the eight osteopathic physicians who have applied for York Hospital Staff privileges, only one application, that of Plaintiff Weiss, has been rejected.

38. At the same time that the application of Plaintiff Weiss was rejected, the application of another osteopathic physician for York Hospital staff privileges was accepted.

39. Since the time that the application of Plaintiff Weiss was rejected, six other osteopathic physicians have applied for York Hospital staff privileges.

40. Of the eight osteopathic physicians who have applied for York Hospital staff privileges, six such applications have been accepted by the York Hospital Board of Directors, and such physicians are members of the York Hospital Medical and Dental staff and one is dormant awaiting supplementation by the applicant.

III. Discussion.

Plaintiff Malcolm Weiss is an osteopathic physician who practices family medicine in York, Pennsylvania. In

1976, Weiss applied to the York Hospital for staff privileges. Weiss's application was denied by the York Hospital Board of Directors on June 30, 1977. Shortly thereafter, Weiss reactivated his application and was again denied staff privileges on March 13, 1979.

In this lawsuit, Weiss challenges the Defendants' alleged abuse of monopoly power in the delivery of inpatient hospital health care services in the York Medical Service Area to the detriment of osteopathic physicians. During this lawsuit, the Defendants have vigorously asserted that the denial of Weiss's application for staff privileges was not taken as a result of or in consideration of Weiss's status as an osteopathic physician.

After the trial of the liability phase of this action, the jury returned answers to 40 special verdict questions on September 1, 1982. Presently before the Court is the request of Weiss and the Plaintiff Class for equitable relief.

Pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26,

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damages by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damages granted by courts of equity, under the rules governing such proceedings. . . .

Thus, before Plaintiff Weiss and the Plaintiff Class are entitled to equitable relief under the antitrust laws, they must show first, that the Defendants violated the antitrust laws and injured the Plaintiff or Plaintiff Class thereby and second, that the injuries to the Plaintiff and Plaintiff Class are of a type appropriately subject to equitable relief.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 129-33, 89 S.Ct. 1562, 1579-1581, 23 L.Ed.2d 129 (1969). *Cf. Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972); *Midwest Paper Products Co. v. Continental Group*, 596 F.2d 573 (3d Cir. 1979).

The parties and the Court are in agreement that they are entitled to a jury determination of the factual issues involved in the claims of Weiss and the Plaintiff class. *E.g. Simler v. Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (per curiam). The parties and the Court are further in agreement that the jury's findings are binding on the Court with respect to the Court's determination of entitlement to equitable relief. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). *See Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *G.T.E. Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980, 986-7 (9th Cir. 1976) (en banc), *aff'd* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

A. Violations of the Sherman Act.

The Court must determine whether the jury's findings of fact satisfy the first prerequisite to equitable relief, namely whether or not there was a violation of the antitrust laws and Plaintiff Weiss and the Plaintiff Class were injured thereby. In this lawsuit, Plaintiff Weiss and the Plaintiff Class contend that the Defendants violated the antitrust laws in four particulars. Plaintiff Weiss and the Plaintiff Class each argue that the Defendants conspired to exclude them from staff privileges at York Hospital in violation of Section 1 of the Sherman Act; and monopolized, attempted to monopolize, and conspired to monopo-

lize unreasonably to exclude Plaintiff Weiss and the Plaintiff Class from staff privileges at York Hospital in violation of Section 2 of the Sherman Act.

1. Conspiracy to Exclude Plaintiff Weiss and the Plaintiff Class.

Section 1 of the Sherman Act makes illegal "Every contract, combination . . . or conspiracy in restraint of trade or commerce among several states . . ." 15 U.S.C. § 1. In order to establish a Section 1 violation, the Plaintiff or Plaintiff Class must establish (1) a conspiracy among the Defendants and other alleged co-consiprators, (2) which results in an unlawful and unreasonable restraint upon interstate commerce, and (3) which causes injury to the Plaintiff or Plaintiff Class in their businesses or property.

With respect to plaintiff Weiss's individual claim of conspiracy to deny him staff privileges at the York Hospital, the jury found that such a conspiracy existed. However, the jury found that such a conspiracy did not constitute an unreasonable restraint upon interstate commerce. Despite the findings of the jury, Plaintiff Weiss now argues that the aforementioned conspiracy constitutes a per se unreasonable restraint upon interstate commerce. Therefore, Weiss argues, the jury's answer to Special Verdict Question No. 8 should be disregarded and the Court should find as a matter of law that the Defendants conspired in violation of the Sherman Act. Since Plaintiff Weiss has otherwise established liability of the York Hospital and the York Hospital Medical and Dental Staff to him under the antitrust laws, the Court need not decide at this time whether the conspiracy to deny Plaintiff Weiss

staff privileges at the York Hospital is in violation of the Sherman Act.

In contrast to the individual claim of Plaintiff Weiss, the jury found with respect to the claim of the Plaintiff Class both that there was a conspiracy to deny or impede reasonable, fair, equal, or full access to staff privileges at the York Hospital by osteopathic physicians other than Plaintiff Weiss and that this conspiracy constituted an unreasonable restraint upon interstate commerce. The jury further found that the York Hospital Medical and Dental Staff was involved in that conspiracy and that the conspiracy caused injury to members of the Plaintiff class other than Plaintiff Weiss in their businesses or property. Since all of the elements of a violation of Section 1 of the Sherman Act were found by the jury, this Court concludes as a matter of law that the York Hospital Medical and Dental Staff violated Section 1 of the Sherman Act and thereby injured members of the Plaintiff Class.

2. Monopoly Claims of Plaintiff Weiss and the Plaintiff Class.

Section 2 of the Sherman Act provides in pertinent part that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States. . ." violates the Sherman Act. 15 U.S.C. § 2.

(a) Monopolization Claims.

The offense of monopolization is established if (1) relevant product and geographic markets have been established, (2) the Defendants had the power to control

prices in or exclude competitors from the relevant market, (3) the Defendants unreasonably used such power to exclude Plaintiff Weiss or the Plaintiff Class from York Hospital staff privileges, and (4) Plaintiff Weiss or the Plaintiff Class were injured in their businesses or property as a result of the Defendants' conduct.

The jury unanimously found that a relevant product market for the provision of inpatient hospital health care services supplied by hospitals and their medical staffs and a relevant geographic market for the provision of those services had been established. The jury further found that the York Hospital had the power both to control prices in and exclude competitors from the relevant market. The jury found that the York Hospital exercised such monopoly power unreasonably to exclude both Plaintiff Weiss and the Plaintiff Class from York Hospital staff privileges and that both Plaintiff Weiss and Plaintiff Class were injured in their businesses or property as a result of the conduct of the York Hospital. Thus, the jury found all the facts necessary to support the legal conclusion that the York Hospital violated Section 2 of the Sherman Act by monopolizing to exclude Plaintiff Weiss and the Plaintiff Class from staff privileges at York Hospital.

The jury also found that individual defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D., acted unreasonably to exclude Plaintiff Weiss and the Plaintiff Class from York Hospital staff privileges and thereby injured Plaintiff Weiss and the Plaintiff Class. However, the jury did not find that these individual Defendants had either the power to control prices in or exclude competitors from

the relevant market. Thus, these individual Defendants did not violate Section 2 of the Sherman Act with respect to the offense of monopolization. 15 U.S.C. § 2.

The jury also found that the York Hospital Medical and Dental Staff had the power to control prices in the relevant market. However, since the jury did not find that the York Hospital Medical and Dental Staff used that power unreasonably to exclude either Plaintiff Weiss or the Plaintiff class from York Hospital staff privileges, the York Hospital Medical and Dental staff did not violate Section 2 of the Sherman Act with respect to the offense of monopolization. 15 U.S.C. § 2.

(b) Claims of Attempt to Monopolize.

The offense of attempted monopolization is established if the Defendants had a specific intent to monopolize, did overt acts in furtherance of that intent, and had a dangerous probability of achieving monopolization of a particular product and geographic market. *Morning Pioneer, Inc. v. Bismarck Tribune Co.,* 493 F.2d 383, 386 (8th Cir. 1974); *Structure Probe, Inc. v. Franklin Institute,* 450 F.Supp. 1272, 1281-82 (E.D.Pa.1978), aff'd, 595 F.2d 1214 (3d Cir. 1979) (memorandum).

With respect to the contentions of Plaintiff Weiss and the Plaintiff Class that the Defendants violated Section 2 of the Sherman Act by committing the offense of attempted monopolization, the jury found that the York Hospital had the specific intent to acquire the power to control prices in or exclude competitors from the relevant markets, did acts directed to accomplishing monopoly power in the relevant market, and had a dangerous probability of achieving monopoly power in the relevant market.

Furthermore, the jury found that both Plaintiff Weiss and the Plaintiff Class were injured as a result of the Defendants' attempted monopolization. Consistent with the jury's findings, as a matter of law this Court concludes that the York Hospital violated Section 2 of the Sherman Act with respect to the offense of attempted monopolization.

(c) Claims of Conspiracy to Monopolize.

Under Section 2 of the Sherman Act, a conspiracy to monopolize is also outlawed. To establish a conspiracy to monopolize in violation of the Sherman Act, Plaintiff Weiss or the Plaintiff Class must establish (1) that the Defendants conspired to obtain the power to control prices in or exclude competitors from the relevant market; (2) that there was a specific intent to monopolize, *e.g. V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651 (E.D.Pa.1975); *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 567 (E.D.Pa.1960), *aff'd*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961) (memorandum); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961) (" . . . the essential element is . . . the specific intent to monopolize. . . ."); and (3) that overt acts were performed by a party to the conspiracy and in furtherance thereof.

With respect to the claims of Plaintiff Weiss and the Plaintiff Class that the Deefndants violated Section 2 of the Sherman Act by conspiring to monopolize, the jury found that the York Hospital conspired with other persons or entities to obtain the power to control prices in or exclude competitors from the relevant market. The York Hospital was also found to have done overt acts directed to accomplishing the monopoly power in the relevant mar-

ket and to have had the specific intent and purpose to acquire the power to control prices in or exclude competitors from the relevant market. The jury further found that both Plaintiff Weiss and the Plaintiff class were injured in their businesses or property by such a conspiracy. Thus, the Court concludes as a matter of law that the York Hospital violated Section 2 of the Sherman Act with respect to the offense of conspiracy to monopolize.

The jury also found that individual Defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. conspired to obtain the power to exclude competitors from or control prices in the relevant market. While the specific intent to monopolize is an essential element of a claim of a conspiracy to monopolize, *V. & L. Cicione, Inc. v. C. Schmidt & Sons, Inc.*, 403 F.Supp. 643, 651 (E.D.Pa.1975), the jury made no finding that these individual Defendants had such specific intent to monopolize. Nonetheless, Plaintiff Weiss and the Plaintiff Class argue that the jury's finding that these individual Defendants conspired to monopolize, when interpreted in light of the Court's charge to the jury, must constitute a conclusion that these individual Defendants conspired to monopolize in violation of Section 2 of the Sherman Act. This Court does not agree. The jury's findings of fact expressly indicate that the individual Defendants did *not* have the specific intent or purpose to acquire either the power to control prices in or to exclude competitors from the relevant product and geographic markets. *See* Jury's Answers to Special Verdict Questions Nos. 26, 27. Thus, these individual Defendants may not be held to have violated Section 2 of the Sherman Act with respect to the offense of conspiracy to monopolize.

3. Summary of Jury's Findings Regarding Violations by the Defendants of the Sherman Act.

The York Hospital Medical and Dental Staff violated Section 1 of the Sherman Act with respect to the Plaintiff Class. The York Hospital violated Section 2 of the Sherman Act with respect to Plaintiff Weiss and the Plaintiff Class. Thus, Plaintiff Weiss and the Plaintiff Class have satisfied the first prerequisite to equitable relief.

B. Propriety of Equitable Relief.

Having established that the antitrust laws have been violated by York Hospital and the York Hospital Medical and Dental Staff, the only remaining question to be addressed by the Court is whether these violations of the antitrust laws have caused "threatened loss or harm" of a type which would warrant the entry of an injunction by the Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 129, 131, 89 S.Ct. 1562, 1579, 1580, 23 L.Ed.2d 129 (1969). Quite clearly, the burden is upon Plaintiff Weiss and the Plaintiff Class to establish that equitable relief is appropriate in this lawsuit. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

In addition to serving the purpose of relief to a private Plaintiff, *e.g. United States v. Borden*, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954), the purpose of injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26 is to ensure enforcement of the antitrust laws. *Zenith Radio*, 395 U.S. at 131, 89 S.Ct. at 1580. Thus, the Supreme Court has admonished that

> Section 16 should be construed and applied with this purpose [of enforcing the antitrust laws] in mind, and with the knowledge that the remedy it affords, like

other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims. . . ." Its availability should be "conditioned by the necessities of the public interest which Congress has sought to protect." *Zenith Radio,* 395 U.S. at 131, 89 S.Ct. at 1580, *quoting Hecht Co. v. Bowles,* 321 U.S. 321, 329-30, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944).

The language of Section 16 of the Clayton Act provides that injunctive relief is available "under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage as granted by courts of equity." 15 U.S.C. § 26. Despite the arguments of Plaintiff Weiss and the Plaintiff Class to the contrary, this Court is convinced that equitable relief under Section 16 of the Clayton Act may be granted only where there is no adequate remedy at law. *Goadby v. Philadelphia Electric Co.,* 639 F.2d 117 (3d Cir. 1981); *Leasco Corp. v. Taussig,* 473 F.2d 777 (2d Cir. 1972). Plaintiff Weiss and the Plaintiff Class refer to the opinion of the Court of Appeals of this Circuit in *Mid-West Paper Products Co. v. Continental Group,* 596 F.2d 573 (3d Cir. 1979) in support of the proposition that availability of a damages remedy is irrelevant to the question of equitable relief under the Clayton Act. This citation is inappropriate, unpersuasive, and irrelevant on this point. Plaintiffs argue that because irreparable injury need not be shown for equitable relief, *Mid-West Paper,* 596 F.2d at 594 n. 85; *Zenith Radio,* 395 U.S. at 130, 131, 89 S.Ct. at 1579, 1580, availability of a damages remedy does not preclude equitable relief. The concept of irreparable injury is not equivalent to the concept of adequacy of legal remedies. *E.g. Baldwin Metals Co., Inc. v. Donovan,* 642 F.2d 768 (5th Cir. 1981) (both irreparable injury and no adequate legal

remedy must normally be shown). *Cf. Reed Enterprises v. Corcoran,* 354 F.2d 519 (D.C.Cir.1965). While inquiry into the existence of irreparable injury is related to a request for a permanent injunction, it is not determinative of the issue.

While Plaintiff Weiss must bear the heavy burden of demonstrating that there is no adequate remedy at law for violations by the York Hospital and the York Hospital Medical and Dental Staff of the antitrust laws, *e.g. United States v. W. T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), this Court is convinced that this burden has been met. In particular, the jury in this case found not only that the York Hospital and the York Hospital Medical and Dental Staff violated the antitrust laws but that their conduct had a "not insubstantial" effect on interstate commerce. The jury has not explicitly found that in addition to injury to Plaintiff Weiss and the Plaintiff Class, the public consumers of medical care in the York Medical Service Area and in particular of inpatient hospital health care services have been injured by the conduct of the York Hospital and the York Hospital Medical and Dental Staff. However, such a factual conclusion is a reasonable inference which may be drawn from the jury's findings. Even assuming that a monetary award might constitute an adequate legal remedy to Plaintiff Weiss and members of the Plaintiff Class injury to the public resulting from the intangible effect the conduct of the York Hospital and the York Hospital Medical and Dental Staff has had on a free and open economy will not be remedied absent injunctive relief.

Furthermore, it is quite obvious that the injury to Plaintiff Weiss and the Plaintiff Class will not fully be

remedied absent equitable relief. Likely, injury to Plaintiff Weiss and members of the Plaintiff Class resulting from their past exclusion from staff privileges at the York Hospital could be remedied by a monetary award of damages. However, absent an injunction, there is no guarantee that the injuries by the York Hospital and the York Hospital Medical and Dental Staff will abate. Thus, there is threatened future harm absent issuance of an injunction. *E.g. United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Mid-West Paper,* 596 F.2d at 594 n. 85 (3d Cir. 1979) (Plaintiff "must establish 'a significant threat of injury' "). The York Hospital and the York Hospital Medical and Dental Staff would have this Court conclude that since no osteopath other than Plaintiff Weiss has had his application for staff privileges at the York Hospital rejected an injunction is unnecessary because there is no threat of future violation. *See* Finding of Fact ¶¶ 36, 37, 38, 39, 40. Nonetheless, this Court is of the opinion that members of the Plaintiff Class were dissuaded from applying for staff privileges at the York Hospital based on a belief that their applications for staff privileges would not fairly be treated and that they would be denied access to those staff privileges because they were not allopathic physicians. Given the facts found by the jury and this Court's finding that denial of staff privileges is a significant adverse professional event for a physician, this collective belief of the Plaintiff Class was reasonable under the circumstances. Because there is a substantial threat of injury to members of the Plaintiff Class from violations of the antitrust laws by the York Hospital and the York Hospital Medical and Dental Staff and because those violations by the Defendants are likely to continue or recur absent issuance of equitable relief,

Mid-West Paper, 596 F.2d at 591 (3d Cir. 1979), an injunction is appropriate in this situation.

C. Proposed Equitable Relief.

On September 14, 1982, Plaintiff Weiss and the Plaintiff Class submitted a proposed equitable order for consideration by the Court. The proposed equitable relief is far-reaching and comprehensive in scope. The proposal for relief requests that an injunction be issued against the York Hospital and the York Hospital Medical and Dental Staff, as well as individual Defendants Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D., and Lois Kushner, M.D. Inasmuch as it is the opinion of this Court that findings of the jury are to the effect that the individual Defendants did not violate the antitrust laws, equitable relief against them is improper. With respect to the York Hospital and the York Hospital Medical Staff, Plaintiff Weiss and the Plaintiff Class request first, that the York Hospital and the York Hospital Medical and Dental Staff be restrained and enjoined from undertaking any overt act against members of the Plaintiff Class or Plaintiff Weiss which would in any way impede or deny Plaintiff Weiss or members of the Plaintiff Class fair, reasonable or equal access to the facilities of York Hospital. In this regard, the Plaintiffs request that applications of osteopathic physicians be subject to the same standard of review as applications of allopathic physicians. Furthermore, the Plaintiffs request that "personality and other criteria lacking professional basis or justification shall not be considered in review of osteopathic physicians' applications. . ." (Proposed Order ¶ 4.1). Second, the Plaintiff's request that the York Hospital and the York Hospital Medical and Dental Staff be restrained and enjoined from

undertaking any overt act against the Plaintiff Class or Plaintiff Weiss which disparages the medical abilities of osteopathic physicians (Proposed Order ¶ 4.2). Third, the Plaintiff's request that the individual Defendants be restrained from participating in the process of review and judgment of applications for staff privileges for a period of 10 years (Proposed Order ¶ 4.3). Fourth, the Plaintiffs request that in order to remedy past unlawful practices, action be taken by the York Hospital Medical and Dental Staff to advertise the results of this lawsuit and to invite osteopathic physicians to apply for staff privileges at York Hospital (Proposed order ¶ 4.4). Fifth, the Plaintiffs request that Plaintiff Weiss be granted staff privileges at York Hospital at the level of "active staff of the Family Practice Department" and that no action be taken to strip Plaintiff Weiss of those staff privileges without prior approval of this Court (Proposed Order ¶ 4.5). Sixth, the Plaintiffs request a statement by the Court that any retaliation for the filing of or participation in this lawsuit by any of the Defendants against Plaintiff Weiss or Plaintiff Class be declared illegal (Proposed Order ¶ 4.6). Seventh, the Plaintiffs request that the By-Laws of the Medical Staff of York Hospital be amended and that the individual Defendants be specifically ordered to abide by the amended by-laws. In particular, the Plaintiffs request that language be added to the by-laws to the effect that "no physicians may be denied staff privileges or have their privileges curtailed or removed [at the York Hospital] as a consequence of possessing or obtaining staff privileges at Memorial Osteopathic Hospital . . ."; that applicants for staff privileges be informed of unfavorable action taken by the Credentials or Executive Committee within 10 days after such action is taken; that osteopathic

physicians who are dissatisfied with any decision of the Board of Directors of the York Hospital have special rights to seek review of those decisions; that osteopathic physicians applying for a change in staff status at York Hospital not be required to obtain a letter of recommendation from the Department Chairman; that temporary staff privileges at York Hospital be granted to osteopathic physicians on the same basis as other physicians; that when evaluating an application for reappointment to staff privileges, the York Hospital committees not consider the applicant's ethics and conduct, cooperation with hospital personnel, relations with other practitioners, and general attitude toward patients, the hospital, and the public; that a special appeals mechanism for review of suspension, revocation, or denial of an application for staff privileges of osteopathic physicians be created; that references to "American Boards of Medical Specialties" be modified so that these references not exclude osteopathic boards of medical specialties; that the compositions of the various committees at the York Hospital be modified to include full representation by osteopathic physicians; and that meetings of the Medical Staff at the York Hospital not be scheduled to conflict with meetings of the Medical Staff of Memorial Osteopathic Hospital (Proposed Order ¶ 4.7). Eighth, the Plaintiffs request that each members of the York Hospital Medical and Dental Staff be required to receive a copy of the equitable order in this case and be required to sign his agreement to abide thereby (Proposed Order ¶ 4.8). The Plaintiffs further request, ninth, that notice be given to the Plaintiff Class of this Court's Order, (Proposed Order ¶ 5), tenth, that counsel for the Plaintiff Class be granted leave to file a request for attorney's fees and costs, (Proposed Order ¶ 6), and, eleventh, that this

Court retain jurisdiction over the matter to enforce this Court's Order (Proposed Order ¶ 7).

In the view of the undersigned, the provisions of the proposed order go far beyond any equitable relief which is justified in this lawsuit. Some of the requested relief is simply inappropriate because of the parties against whom that relief is requested have been found by the Court not to have violated the antitrust laws. Some of the relief such as amendments to the By-Laws of the York Hospital Medical Staff are grossly intrusive upon the autonomy of that body and are unjustified under the circumstances. Further, this Court is of the opinion that it has neither the technical expertise nor appropriate guidance from the parties to consider modifications of the by-laws as proposed by Plaintiff Weiss and the Plaintiff Class. In the view of this Court, the proposed amendments to the By-Laws of the York Hospital Medical Staff go far beyond any discrimination which existed in this case. Furthermore, the kind of "affirmative action" which Plaintiff Weiss and the Plaintiff Class request would be appropriate only were there evidence of invidious discrimination. No such evidence has been presented. Indeed, the only evidence of any impropriety with respect to the By-Laws of the York Hospital Medical Staff relates to the requirement for staff members that they be certified by an appropriate "American Board of Medical Specialties." Were it the case that the interpretation proposed by Plaintiff Weiss and the Plaintiff Class that the foregoing phrase refers only to allopathic boards of specialties and excludes osteopathic boards of specialties, the Court would be inclnied to modify this phrase. However, the Court is of the opinion that the phrase is, at worst, ambiguous. Thus, rather, than ordering that the by-laws be amended, the Court will direct that the phrase "American

Board of Medical Specialties" be interpreted to include both allopathic and osteopathic boards of medical specialties.

Furthermore, a portion of the proposed relief appears to be particularly inappropriate. In particular, individual members of the York Hospital Medical and Dental Staff would be required under the proposed order to acknowledge receipt of the Court's order and to agree to be bound thereby. No authority is stated for the proposition that this Court can bind persons who are not parties to this lawsuit in the situation where those non-parties are not acting in concert with parties to this lawsuit. Indeed, the Court doubts such authority exists. F.R.Civ.P. 65(d). *See, e.g., Backo v. Local 281,* 438 F.2d 176 (2d Cir. 1970), *cert. denied,* 404 U.S. 858, 92 S.Ct. 110, 30 L.Ed.2d 99 (1971); *Lankford v. Gelston,* 364 F.2d 197 (4th Cir. 1966); *Le Tourneau v. N.L.R.B.,* 150 F.2d 1012 (5th Cir. 1945). With respect to the request of the Plaintiffs that they be granted leave to file a request for attorney's fees and costs, the Court considers that there is no need for the grant of such authority Finally, the Plaintiffs' request that Plaintiff Weiss be placed on the active staff of the Family Practice Department of the York Hospital is unjustified. Plaintiff Weiss has established to the satisfaction of this Court and the jury only that he was discriminated against because he was an osteopath. While the jury found that but for the fact that Plaintiff Weiss was an osteopathic physician, he would have been admitted to staff privileges at the York Hospital, such a finding of fact does not, alone, entitle Plaintiff Weiss to equitable relief beyond that given to the Plaintiff Class.

Although the broad requested relief is not appropriate, more modest injunctive relief will be ordered.

IV. Conclusions of Law.

1. The York Hospital Medical and Dental Staff conspired to deny or impede reasonable, fair, equal, or full access to staff privileges at York Hospital by osteopathic physicians, in violation of Section 1 of the Sherman Act.

2. The York Hospital committed the offense of monopolization in violation of Section 2 of the Sherman Act unreasonably to exclude both Plaintiff Weiss and the Plaintiff Class from York Hospital Staff privileges.

3. The York Hospital committed the offense of attempt to monopolize in violation of Section 2 of the Sherman Act by attempting to acquire the power to control prices in or exclude competitiors from the relevant market resulting in injury to Plaintiff Weiss and the Plaintiff Class.

4. The York Hospital committed the offense of conspiracy to monopolize in violation of Section 2 of the Sherman Act by conspiring with others to obtain the power to control prices in or exclude competitors from the relevant market, resulting in injury to Plaintiff Weiss and the Plaintff Class.

5. The individual Defendants have not violated the antitrust laws.

6. There is a significant threat of injury to Plaintiff Weiss and the Plaintiff Class from violations by the York Hospital and the York Hospital Medical and Dental Staff of the antitrust laws and such violations are likely to continue or recur.

7. Both Plaintiff Weiss and the Plaintiff Class have no adequate remedy at law for the violations by the York

Hospital and the York Hospital Medical and Dental Staff of the antitrust laws.

8. Equitable relief for Plaintiff Weiss and the Plaintiff Class is necessary.

An appropriate order will be entered.

ORDER

1. Pursuant to the Court's authority under 15 U.S.C. § 26, this Court hereby declares that the following equitable relief shall be entered against Defendants York Hospital and York Hospital Medical and Dental Staff.

> 1.1 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from undertaking any overt act against either Plaintiff Weiss or members of the Plaintiff Class which would in any way impede or deny the Plaintiffs full, reasonable, fair, or equal access to the facilities of York Hospital and full, reasonable, fair or equal access to staff privileges at the York Hospital.
>
> 1.2 The York Hospital and the York Hospital Medical and Dental Staff are restrained and enjoined from applying standards of review to applications by osteopathic physicians for staff privileges at the York Hospital different from the standards of review applicable to similar applications of allopathic physicians.
>
> 1.3 The York Hospital and the York Hospital Medical and Dental staff are restrained and enjoined from interpreting the expression" American Board of Medical Specialty" as used in the York Hospital Medical Staff By-Laws to exclude osteopathic boards of medical specialty.

2. Members of the Plaintiff Class shall, within 30 days after the date of this order, be notified by the attorneys for the Plaintiff Class by certified mail, return re-

ceipt requested, of the finding of liability against the York Hospital and the York Hospital Medical and Dental Staff of the terms of this order, and of the right of members of the Plaintiff Class to claim damages and the necessity of sending a claim form to the Clerk of Court. The notice shall read as follows:

> In *Weiss vs. York Hospital, et al.,* Civil No. 80-0134 (M.D.Pa. September 30, 1982), Plaintiff Weiss brought suit against the Defendants on behalf of himself and a class of osteopathic physicians in the York Medical Service Area, claiming that both Plaintiff Weiss and the Plaintiff Class had been excluded from staff privileges at the York Hospital and that such exclusion was illegal under the antitrust laws, 15 U.S.C. §§ 1, 2. A finding of liability has been entered on behalf of Plaintiff Weiss and on behalf of the Plaintiff Class. As a member of the Plaintiff Class, you are permitted to claim damages at a hearing to be held by this Court. If you wish to participate at that hearing and to claim damages, it is required that you complete the enclosed form and return it to the Clerk of Court. The enclosed form must be received by the Clerk of Court by November 30, 1982. If the Clerk of Court does not receive the enclosed form, you will lose and waive any rights you may have to claim damages. Please return the form to:
>
> Clerk
> United States District Court
> Middle District of Pennsylvania
> United States Courthouse
> Williamsport, Pennsylvania, 17701
>
> You may be represented by an attorney of your choice in the damages phase of this proceeding. However, if you wish to be represented by your own counsel, you must so notify the Court in your notice of claim. Otherwise, you will be represented by Levin and Fishbein, 320 Walnut Street, Suite 600 Philadel-

phia, Pennsylvania, 19106 and Markowitz & Seidensticker, P. C., 55 South Queen Street, York, Pennsylvania, 17403.

3. The claim form to be distributed to members of the Plaintiff Class shall read as follows:

> I, _____ (print full name) have been informed of my right to claim damages as a member of the class of osteopathic physicians in the action of *Weiss vs. York Hospital, et al.*, No. 80-0134 M.D.Pa. and — will — will not (check one) present a claim. I — will — will not (check one) be represented by Markowitz & Seidensticker and Levin and Fishbein.
>
> _____
>
> Signature.

4. Jurisdiction is reserved to issue such further orders as may be advisable.

5. The Clerk of Court shall enter judgment on liability consistent with the jury's answers to the special verdict questions and this Court's opinion and order entered today.

6. The damages phase of this trial is hereby placed on the Court's February 1983 list for trial in Williamsport.

7. A settlement conference will be held in this case on January 3, 1983.

8. A pre-trial conference will be held in this case on February 2, 1983.

9. Jury selection will be held in this case commencing at 10:00 A.M. on February 3, 1983.

10. All discovery shall be completed by January 14, 1983.

JUDGMENT ON SPECIAL VERDICT

This action came on for trial before the Court and a jury, Honorable Malcolm Muir, District Judge, presiding, and the issues having been duly tried and the jury having rendered its special verdict,

IT IS ORDERED AND ADJUDGED that the York Hospital Medical and Dental Staff is liable to the Plaintiff Class for violations of Section 1 of the Sherman Act;

FURTHER, that the York Hospital is liable to Plaintiff Malcolm Weiss and the Plaintiff Class for violations of Section 2 of the Sherman Act;

FURTHER, that the York Hospital, Thomas L. Bauer, M.D., Ivan L. Butler, M.D., S. W. Deisher, M.D. and Lois Kushner, M.D,, are liable to Plaintiff Malcolm Weiss for tortiously interfering with his contractual relations with third parties.

IT IS FURTHER ADJUDGED that Gary Ardison, M.D., Jack A. Kline, M.D., S. Philip Laucks, M.D., Harold H. MacDougall, M.D., Iain L. MacKenzie, M.D. and John P. Whiteley, M.D., are not liable to either Plaintiff Malcolm Weiss or the Plaintiff Class;

FURTHER, that as against the Defendants named in the preceding paragraph Plaintiff Malcolm Weiss and Plaintiff Class shall take nothing and this action shall be dismissed as to the Defendants named in the preceding paragraph.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 80-0134

Complaint Filed 2/6/80
(Judge Muir)

MALCOLM WEISS,

Plaintiff,

vs.

YORK HOSPITAL, et al.,

Defendants.

ORDER

October 21, 1982

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On September 30, 1982, this Court issued an opinion and order with respect to the claims of Plaintiff Weiss and the Plaintiff Class for equitable relief. Several errors in the opinion and order have been brought to the Court's attention. It is the purpose of this order to correct those errors.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The second sentence of the first full paragraph on page 10 is deleted and replaced with the following language:

> The parties and the Court are further in agreement that the jury's findings are binding on the Court with respect to the Court's detemination of entitlement to equitable relief. Beacon Theatres, Inc. vs. Westover, 359 U.S. 500 (1959). *See* Dairy Queen, Inc. vs. Wood,

369 U.S. 469, 472-73 (1962); G.T.E. Slvania, Inc. vs. Continental TV, Inc., 537 F.2d 980, 986-7 (9th Cir. 1976) (en banc), *aff'd* 433 U.S. 36 (1977).

A. Violations of the Sherman Act.

The Court must determine whether the jury's findigs of fact satisfy the first prerequisite to equitable relief, namely whether or not there was a violation of the antitrust laws and Plaintiff Weiss and the Plaintiff Class were injured thereby. In this lawsuit, Plaintiff Weiss and the Plaintiff Class contend that the Defendants violated the antitrust laws in four particulars. Plaintiff Weiss and the Plaintiff Class each argue that the Defendants conspired to exclude them from staff privilegs at York Hospital in violation of Section 1 of the Sherman Act; and monopolized, attempted to monopolize, and consiperd to monopolize unreasonably to exclude Plaintiff Weiss and the Plaintiff Class from staff privileges at York Hospital in violation of Section 2 of the Sherman Act.

2. The last sentence of the first full paragraph on page 11 is deleted and replaced with the following language:

Since Plaintiff Weiss has otherwise established liability of the York Hospital and the York Hospital Medical and Dental Staff to him under the antitrust laws, the Court need not decide at this time whether the conspiracy to deny Plaintiff Weiss staff privileges at the York Hospital is in violation of the Sherman Act.

3. The second sentence of the first full paragraph on page 17 of this Court's opinion and order is deleted and replaced with the following language:

The York Hospital violated Section 2 of the Sherman Act with respect to Plaintiff Weiss and the Plaintiff Class.

/s/ Muir
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507/3580/3581

MALCOLM WEISS, *Appellee* in Nos. 82-3507 & 82-3580
Cross-Appellant in No. 82-3581

v.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D.; HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., S. W. DEISHER, M.D., JACK A. KLINE, M.D., LOIS M. KUSHNER, IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D., *Appellants* in Nos. 82-3507 & 82-3580 *Cross-Appellees* in No. 82-3581

SUR PETITION FOR REHEARING

Present: SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and VAN DUSEN, *Senior Circuit Judge**

The conditioned petition for rehearing filed by Malcolm Weiss, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied as moot.

By the Court,

/s/ Edward R. Becker
Judge

Dated: October 25, 1984

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*As to panel rehearing only.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3507/3580/3581

MALCOLM WEISS, *Appellee* in Nos. 82-3507 & 82-3580
Cross-Appellant in No. 82-3581

v.

YORK HOSPITAL and THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D.; HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., S. W. DEISHER, M.D., JACK A. KLINE, M.D., LOIS M. KUSHNER, IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D., *Appellants* in Nos. 82-3507 & 82-3580; *Cross-Appellees* in No. 82-3581

SUR PETITION FOR REHEARING

Present: SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges* and VAN DUSEN, *Senior Circuit Judge**

The petition for rehearing filed by The Medical and Dental Staff of York Hospital, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Edward R. Becker
Judge

Dated: October 25, 1984

---

*As to panel rehearing only.

VOLUME I—August 11, 1982, P.M. Session

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CA-80-0134

MALCOLM WEISS

Plaintiff

vs.

YORK HOSPITAL, et al

Defendant

August 11, 1982
Williamsport, Pa.

BEFORE: HONORABLE MALCOLM MUIR and a jury

APPEARANCES:

For the Plaintiff:

Arnold Levin, Esq.
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For the Defendant:

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* * *

Cross-Examination of Malcolm Weiss, D.O.

BY MR. SAVETT:

(p. 43) Q. You testified that you had some problems with communications as to some of the specialists at York getting reports on your patients.

A. Yes.

Q. Do you recall testifying in your deposition that there were only two instances of difficulty?

A. The deposition was so long ago I can't recall but I can remember some difficult problems with specialists.

Q. Why don't you tell the jury how many problems (p. 44) were there.

A. The ones that remain in my mind were one with an open-heart surgery where a patient of mine was scheduled for open-heart surgery and he called me on the phone and he said I'm going to have open-heart surgery at York, what do you think about it. I didn't know anything about it. I said calm down. I don't know what's going on. He said what do you mean you don't know. I said I don't know but I'll try to find out. That was one instance when I had a very difficult problem concerning my continuing care with the patient and also reassurance of the patient. And the bottom line of that was that I convinced that patient that he would receive adequate treatment. He wanted to go to another institution and I said no, I think you should have it here in York. I can recall that very vividly.

The other cases just so many of them when patients go to the hospital, receive cancer therapy or even patients that are in accidents that I lose track of, that I don't get the proper reports. I may get a report days after they're in the hospital from the emergency room. The patient went in on Monday and I get a report on Thursday. What can I do for that patient. I can't participate in his care. I can't go to the emergency room and be there and do the procedure. If my patient has a laceration and goes to the

York Hospital, they don't call me and say Dr. Weiss would you like to come in and repair this. At Memorial they call me. They give me the (p. 45) opportunity to come in to do the procedure which I charge a fee for. It's my living. This is how I earn my living.

Q. Let's take the first case. You said you were surprised that the patient was in the hospital. Is that what you said?

A. I was surprised that the patient was going to have open-heart surgery.

Q. So in other words, you weren't the doctor that placed him in the hospital or referred him to the York Hospital?

A. I'm the doctor that diagnosed him as having a heart problem and put him into Memorial Hospital with specialists to take care of him and it was collectively decided that he should go on and have cardiac angiography and they arranged to send him to the York Hospital where he went and had the procedure and then the decision was made to do the open-heart surgery without notifying me first.

Q. Do the specialists at Memorial tell you they were placing him in York?

A. The specialists at Memorial told me that they were going to be sending the patient for angiography, but I didn't know the exact date because that depends on the schedule that the York Hospital has on performing the angiographies.

Q. So the specialist at Memorial Hospital never got back to you and told you to tell you the exact date?

(p. 46) A. The specialist at Memorial Hospital was probably taking care of other patients and not making that one referral his entire days work. It's the obligation of the doctor who received the referral to give the courtesy to call the attending physicians and state what the plans are. That is medical courtesy.

Q. This heart case, was that Dr. Martin at York that you were complaining about?

A. That was Dr. Martin's case, yes.

Q. Dr. Martin is not a Defendant here, is he?

A. He's on the staff of the York Hospital. I've heard so much argument about who are Defendants and who are not. The complaint states the medical and general staff is named. I have difficulty understanding all the legal ramifications of who is named and I rely on my legal counsel to prepare that.

Q. Just like I have difficulty following your testimony? There's all kinds of procedures and I assume it's the same difficulty.

THE COURT: May I see counsel please.

(At side bar.)

THE COURT: What is the authority for that last observation?

MR. SAVETT: I'm sorry.

THE COURT: What is your authority for making that observation?

(p. 47) MR. SAVETT: Which observation?

THE COURT: Well the one you just made.

MR. SAVETT: I just make light of the basis that I have difficulty following medical. I'll cut it out.

THE COURT: I don't think that you ought to say that.

MR. SAVETT: I agree. Thank you for calling that to my attention.

(Open Court.)

BY MR. SAVETT:

Q. We have the one patient with Dr. Martin. You mentioned another case I believe that you had difficulty in talking to the specialist at York?

A. I can't recall the specific case right now, Mr. Savett. This has been going on for many years. Do you wish to refresh my memory?

Q. I'm trying to find out how many times you really had difficulty. So far I've only heard of one time and that one time seems to appear due to possible problems at Memorial.

MR. MARKOWITZ: Court please, I obpect to the characterization by Counsel, that's argumentative.

THE COURT: What's your view?

MR. SAVETT: This is cross examination, your (p. 48) Honor.

THE COURT: I'm well aware of that. I've heard that three times and it's not necessary to say that.

What's your response to Mr. Markowitz's objection?

MR. SAVETT: I don't think the question was objectionable.

THE COURT: That isn't helpful to me though. He says it's argumentative. I'd like to hear why you think it is not argumentative?

MR. SAVETT: I think it is a fact of what Dr. Weiss just testified to.

THE COURT: All right. Read the question back.

(The question was read.)

THE COURT: Well there's no question. I'll sustain the objection. You may pursue the inquiry but that wasn't phrased in interrogatory form as I heard it from the Reporter.

MR. SAVETT: I'll rephrase it, your Honor.

BY MR. SAVETT:

Q. Today you could not remember any other case?

A. I just remembered another case.

Q. Will you kindly tell the jury please?

A. A patient of mine had fallen off of a bridge (p. 49) on her sister's farm. She was leaning against a railing or some kind of a strength which gave way. She fell off and injured herself seriously and was taken to the York Hospital by ambulance. And I did not learn of this accident until the patient came into my office months later with a major scar on her body and I said what is that from and she proceeded to tell me what she had gone through in the hospital and I was never notified that she was there and she had told them that I was her family doctor.

Q. But she never called you from the hospital, did she?

A. I don't think she was in a position to pick up the phone and ask for me to come. She was seriously injured.

Q. But you never received a telephone call from her at any time while she was in the hospital?

A. No.

Q. How about from any members of her family?

A. She didn't have any family. She had a little son. She was divorced and her husband as a matter of fact was in prison in Florida.

Q. Do you know when this occurred, Doctor?

A. I can't recall the date, Mr. Savett.

Q. Do you recall approximately how long ago?

A. Three years.

Q. Can you remember any other case?

A. Yes.

(p. 50) Q. Please tell us.

A. I have a patient that I diagnosed as having a problem with his chest. He was a friend and a patient and as with friends sometimes they don't come as patients too often and I recall saying to him, your cough is terrible. You better get into my office and indeed he came into my office. We started testing and he had lung cancer. He was operated on at Memorial Hospital by a doctor that's here today and he eventually had to go to the York Hospital for care, for treatment of his tumor. And when he went over there he had also diabetes which I had been previously treating and he went to a doctor at the York Hospital who proceeded to treat his cancer and then also pro-

ceeded to send him to somebody else to treat his diabetes. The patient, you know, they are sick, they go where they're told. They think that's what the method of operation is. They're not going to pick up a phone and start a ruckus. They don't understand what's happening. They're sick. They want to get better. They're not into referrals and referring patterns and whether Dr. Weiss has the right to continue to earn a living seeing them. That's not their problem and it shouldn't be. Their problem is to get better, get relief, get help.

Q. Did the doctor over at York, the cancer doctor at York, give reports to the cancer doctor at Memorial, if you know?

A. The doctor at York sent copies of letters of (p. 51) his care to the various doctors who were in the case at Memorial.

Q. On the chart at York did it say that Dr. Weiss was the family doctor of this person?

A. I haven't seen the chart at York.

Q. Because you haven't visited York, is that correct?

A. I don't have privileges to take care of the patient so I don't go there as a visitor.

Q. Do you remember any other cases, Dr. Weiss? We're talking about bad communications between you and some specialist or sub-specialist at York Hospital.

A. I remember another case now. A patient of mine who had breast cancer who was operated on at Memorial and who ended up at York and who proceeded to be directed to their family practice department and I never received a phone call from the doctor who had taken over her

case at York to tell me of the disposition of the case. As a matter of fact I thought the patient may be mad at me for some reason. Maybe I did something wrong. I didn't know and she appeared in my office months later and said I want to come back to you. I said I didn't know you ever left me really. She said no I was told that I had to go here for care by her cancer doctor. I consider that a lack of communication. I consider that a lack of continuity of patient care.

Q. The care that she received by this family (p. 52) practitioner, this was care while she was at the York Hospital, was it not?

A. She was an outpatient. She was an inpatient and an outpatient, that type of thing.

Q. But you knew she was being scheduled for surgery at York Hospital?

A. She was operated on at Memorial Hospital and we had to send her to the York Hospital for the procedures that we didn't have, the radiotherapy, the cancer specialist.

Q. Who sent her to York Hospital?

A. At the time I believe Dr. Charles Hash made that decision.

Q. Do you know whether Dr. Hash received any reports from York Hospital?

A. I guess you'll have to ask that of Dr. Hash. I can only assume that he would receive reports.

* * *

Direct Examination of Dr. Charles Hash, D.O.

(p. 69) Q. Do you have patients that you and Dr. Weiss have in common, that is patients that Dr. Weiss has referred to you that ultimately have to go to the York Hospital?

A. Yes, Dr. Weiss and I definitely have patients in common that have for one reason or the other ended up at York Hospital for their facilities. So the answer to the question is yes.

Q. Have you always received those patients back?

A. No sir, I have not.

Q. What has happened?

A. I remember a case, not one that Dr. Weiss brought up but I know it was a personal friend of his because I remember he called me on the phone and said I'm sending over a patient that has this mass on her neck.

THE COURT: I couldn't get that.

THE WITNESS: I saw a patient who had a mass in her neck.

THE COURT: Mass.

THE WITNESS: Right. A lump. And to make a long story short I did a biopsy of this and the patient was an Italian lady and she spoke very poor English and was confused and her husband came in, they were really nice people. And after explaining this whole thing to them, I said I think she (p. 70) has a problem here. We should get a biopsy of it. I had a pretty good idea what we were dealing with and that it would require further therapy. I subsequently presented this patient to our tumor board which

I coincidentally happen to be the head of tumor board where various sub-specialists get together and help determine the fate of patients, as far as their care and how they should be handled properly in the future. It was the decision of tumor board and their recommendation that this patient receive an onocologic evaluation by an onocolgist who is a cancer specialist.

THE COURT: You're going too fast.

MR. MARKOWITZ: Mr. Plesce is very good, but like me he's getting a little bit older.

THE WITNESS: I've been watching his dexterity. It appears to be excellent.

I sent this patient to a M.D. cancer specialist for another opinion before proceeding with the case. And subsequently I never heard from the patient again who I had an excellent rapport with and the patient's family. By the grapevine I found out, approximately a week or so later, that this patient was being operated on at York Hospital.

MR. SAVETT: Objection your Honor. We have a hearsay problem again.

THE WITNESS: This is not hearsay.

THE COURT: Lawyers and judges have been (p. 71) discoverying for years to figure out precisely what is hearsay and I don't profess to know anything about surgery but I probably know as much about surgery as you do about hearsay.

MR. MARKOWITZ: Judge Loango always tells the story about the juror who interrupted the proceedings and asked to ask a question and he said figured why not the

juror ask the question. He said it was the most sensible question anyone had asked during the entire trial. Maybe we ought to listen to the doctor.

THE COURT: Well we can't do that.

MR. MARKOWITZ: I understand.

THE COURT: Is it hearsay.

MR. MARKOWITZ: I believe I can clarify it with additional questions, your Honor.

THE COURT: All right.

BY MR. MARKOWITZ:

Q. Doctor, how did you find this out? Not what you were told but the manner in which you found it out.

A. I received a call and I think it was a call from Dr. Weiss because this patient was also a personal friend and the patient told him that.

MR. SAVETT: Your Honor—

MR. MARKOWITZ: Not what the patient told him.

THE WITNESS: Dr. Weiss told me that the patient told him.

(p. 72) MR. SAVETT: Objection.

MR. MARKOWITZ: I think we ought to let him finish his answer then you can object to it.

THE COURT: I don't think we ought to get the hearsay in and then we've got troubles getting it out.

MR. MARKOWITZ: Dr. Weiss is a party.

THE COURT: This is not an admission against Dr. Weiss's interests. If there were something said by one

of the Defendants against their interests then it could come in.

MR. MARKOWITZ: Okay. I think that's correct, your Honor.

THE COURT: Go ahead with another question.

BY MR. MARKOWITZ:

Q. Without telling us what Dr. Weiss told you, someone else said, what did you do?

A. The patient subsequently was operated at York Hospital totally without my knowledge. I in turn got on the phone and talked to the sub-specialist, the cancer specialist, who I had sent the patient to, my patient to. And after about five minutes of studdering on his part he finally came to the conclusion that the patient had decided she wanted to go to York Hospital. Thus he referred her to a surgeon there, my patient without even telling me.

Q. Have you had other occasions where you have had patients that have been sent over there and not returned?

(p. 73) A. Yes sir, I have.

Q. And can you tell the jury several other of those occasions?

A. To summarize a group of them, York Hospital as Dr. Weiss told you has the facilities capable of replacing the kidneys, a dialysis unit, which sometimes forever or sometimes for short term, patients are put on dialysis. Sometimes until their kidneys get over a disease or perhaps sometimes permanently if they've failed for one reason or the other. In the specialty of surgery where we're dealing with very sick patients it is not uncommon at all

for patients to require renal dialysis. Our hospital does not have these facilities. Thus when we have a patient that needs renal dialysis for excellent patient care we certainly send them to York Hospital. When our patients are transferred to York Hospital for dialysis I do not have the right to take care of my patients. They are probably just operated on from that period on. Their care is then delegated to another specialist at the opposite hospital, even though I personally having been there during the operation certainly could provide much better care of these patients.

Q. Why do you say that, Doctor?

A. Well in any operation obviously the person that's been there knows what's going on the best with few exceptions. And if I'm the one doing the operation I certainly can give more input into what was found at the time of surgery (p. 74) than somebody who started fresh on the case.

Q. You say this is a group of patients that this has occurred?

A. Over my practice since 1977 in York, renal patients I would catagorize at approximately ten patients as such in that category.

Q. Are there any other instances where this has occurred?

A. I specifically remember a case where, and not the case Dr. Weiss referred to, but a case where I operated on a lady for breast cancer, subsequently tumor board recommended a high-voltage radiation to the area to hopefully eliminate any remnant cancer that may be

present. So again I sent this patient for radiation therapy merely by luck in my office because I think the intern that had been in my service at that time asked me about the patient. I said gee, she hasn't shown up for post-op visit and to make a long story short in tracking her down, I found out she was referred to another surgeon at York Hospital and another general practitioner for care.

Q. Does this constitute a problem for you?

A. Obviously.

Q. In what sense?

A. Well, it constitutes several problems. Number 1 I think it's professionally demeaning to lose your patient right in the middle of their care. You have a patient (p. 75) where you're taking care of one day and the next day you have no control over the patient's care.

Number 2, obviously it has a financial impact, I lose income because of this.

Number 3, I feel that my practice to some degree is limited because of not having the facilities of the larger hospital and of their many means and equipment that we don't have.

* * *

Cross-examination of Dr. Charles Hash, D.O.

(p. 85) Q. Do you know who the individual defendants are (p. 86) in this case?

A. No sir, I do not.

Q. Are you familiar with Dr. Phillip Laucks?

A. I've never heard the name.

Q. You never heard the name. So you don't know whether that doctor took any patient away from you?

A. What's his name again?

Q. Phillip Laucks.

THE COURT: Spell it.

MR. SAVETT: L-A-U-C-K-S.

THE WITNESS: I am not familiar with him and I'm not familiar if he took any patients from me.

BY MR. SAVETT:

Q. Dr. Harold McDoogle?

A. I know his twin brother.

Q. Do you know him?

A. No, I do not.

Q. Do you know whether Dr. McDoogle took any patients away from you?

A. No sir, I do not.

Q. Dr. Don McKenzie, do you know him?

A. I know who he is professionally.

Q. Do you know whether he took any patients away from you?

A. Yes he did. I was involved in a very very (p. 87) difficult case several years ago where Dr. McKenzie was asked for a second opinion. The patient was transferred. He said he wouldn't give the second opinion in our hospital. The patient subsequently was transferred to York

Hospital and I never got a phone call from him and on the patient I never heard another thing or even got a report on the patient.

* * *

VOLUME II—AFTERNOON SESSION

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CA-80-0134

MALCOLM WEISS

Plaintiff

vs

YORK HOSPITAL, et al

Defendant

August 12, 1982
Williamsport, Pa.

BEFORE: HONORABLE MALCOLM MUIR and a jury

APPEARANCES:

For the Plaintiff: Arnold Levin, Esq.
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York, PA 17403

For the Defendant: David H. Weinstein, Esq.
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119 East Market Street
York, PA 17401

(p. 23) Q. Dr. Knapp, do you have patients who indiate a preference to go to one hospital or the other in York?

(p. 24) A. Yes, I do.

Q. And can you tell the jury those patients who indicate a preference to go to the York Hospital, how do you handle those?

A. The patients who request to go to York Hospital if they have a specialist with whom they are familiar and whom they request, then I will call that specialist and refer them in. Otherwise with my lack of familiarity with the abilities and qualifications of those specialists I depend on referring that patient into the emergency department for referral from there.

Q. When you send them over to the York Hospital, do you receive reports from the hospital?

A. Occasionally.

Q. What do you mean by occasionally?

A. I receive emergency department reports and again occasionally on my patients. I can remember receiving about 3 maybe 4 reports from the specialist to whom the patient was referred.

Q. Are there occasions when you do not receive reports?

A. Many.

Q. What happens at that point? How do you treat your patient?

A. It makes it very difficult since I do not (p. 25) know exactly what has been done to this patient, what the program for this patient is, what the rehabilitative potential for this patient is. It leaves me in a very bad stiuation with the family as well as the patient. Often I have attempted to contact the specialist to obtain this but this is not always met with success.

Q. Why does it leave you in a bad position with the family?

A. The family expects me to have that information. I'm supposed to be the patient's primary care physician. I handle their problems. I answer their questions. I'm the one that's always available. I'm available 24 hours a day, seven days a week. If they have a problem, they turn to me. Unfortunately this hinders me with knowing what the total care of the patient is, what problems may be expected.

Q. Are there certain services and facilities that are rendered at York Hospital that are not rendered at Memorial?

A. Yes there are.

Q. What are they?

A. Since the death of Dr. Malina, neurosurgery is not offered at Memorial Osteopathic Hospital whereas it is at York Hospital. Cardiac catherization again we were speaking yesterday, shooting of the dye into the heart for heart disease, open-heart surgery, dialysis. That's all I can (p. 26) think of at the moment.

Q. Do you send patients over there for that treatment?

A. Yes I do.

Q. Who was Dr. Malina?

A. Dr. Malina was an M.D. neurosurgeon who was on the staff at Memorial Osteopathic Hospital as a neurosurgeon and did the bulk of our neurosurgical cases.

Q. Why was it important to have a neurosurgeon on the staff at the hospital?

A. There are a number of conditions which do warrant neurosurgery other than acute traumatic problems. A lot of times as in my case I would have patients from the nursing home who would fall and develop blood clots on the outside of the brain causing stroke-like symptoms. This needs to be evacuated, removed in order to return normal neurosurgical functions to that patient as much as possible.

There are brain tumors that do present and need to be removed to restore normal neurosurgical function.

In the case of trauma patients it becomes very important for a head injury patient to have access to a neurosurgeon in case an acute event occurs such as bleeding into the brain or surrounding tissue where that has to be relieved, the pressure has to be relieved to maintain neurological functions.

(p. 27) Q. And Dr. Malina performed these services?

A. Right.

Q. How are these services now handled since his death. If you have a patient who has a neurological problem?

A. From the standpoint of trauma patients, those patients are automatically sent to York Hospital. From the standpoint of private patients, these patients must be referred to a hospital that has a neurosurgeon. Some go to York Hospital, others may prefer Johns Hopkins, etc.

Q. Those patients that go to York Hospital, what happens to them?

A. I'm not really certain.

Q. Why is that?

A. Because in my case the patients that I have sent I've not received a report as to the care of that patient.

Q. Do you know who are the neurosurgeons at York Hospital?

A. I know the gentleman that I've referred patients to.

Q. And who is that?

A. That was Dr. Butler, Dr. Paul and Dr. Rankin.

MR. SAVETT: Excuse me. I didn't hear that.

THE WITNESS: Dr. Butler, Dr. Paul and I believe it's Rankin.

BY MR. MARKOWITZ:

(p. 28) Q. Are they members of the same group?

A. Yes, to the best of my knowledge.

Q. What do we mean by group? Would you tell the jury?

A. It's a number of physicians that practice together under the same partnership or corporation sharing responsibility for the patient, provide coverage for each other.

Q. Has this failure to receive reports affected your ability to practice medicine?

A. Would you rephrase the question or repeat the question?

Q. Has this failure to receive reports from the Butler group affected you ability to practice medicine?

A. Has it affected—let me restate that. I have had difficult instances maintaining good patient care in a patient that I did not receive a report on, yes.

Q. Could you give the jury several instances or an instance?

A. I had as one instance a patient who appeared to have a stroke at the nursing home. Before this event the patient was very alert, talkative, very pleasant little lady. Again she appeared to have a stroke. I hospitalized her and ordered a CT scan of the head at Memorial, that's the cat scan slice of the brain.

At that time there appeared to be what is (p. 28) called a manigioma, that is a tumor which sits on the edge of the brain usually benign tumor which puts pressure on the brain and exerts itself like a stroke. There are symptoms of the increased pressure in the brain, there may be some paralysis, any number of other symptoms. This was shortly after Dr. Malina had died and I called Dr. Butler, Paul and Rankin at that time. I believe it was Dr. Butler that I spoke to who I reviewed the case with. I gave him the results of all the past history on this patient, what we'd found as far as physical findings what we'd found as far as the cat scan, the tumor. I asked him if he would come to Memorial to consult on this patient as there had been consulting privileges arranged on a case per case

basis. He said no he would not but if I would send the patient over, he would evaluate her and operate if he felt necessary.

I transferred the patient to York Hospital along with my discharge summary, which was dictated, a copy of the cat scan films, all the reports and most of the charts on that patient. Approximately one week later I had made two calls into the office and had received no reply as to what was happening with my patient.

Q. Whose office was that?

A. This was Dr.—I called Dr. Butler.

Q. Okay.

A. I received no answer. A message was left with (p. 30) my answering service that this patient had medistatic renal carcinoma and that means cancer of the kidney that had gone to the brain. The next message I received on this patient was a call from the nursing home asking for orders on this patient approximately, I believe it was a month or month and a half later. The patient had been returned to the nursing home. That was my first follow-up on the patient. There were a number of orders which were not consistent with the previous condition of this patient. I visited the nursing home and was immediately confronted by one of the family members who asked what happened to Mom. When I went to visit "Mom" this patient with who I was involved I had a patient who was basically comatose. A number of infections—

MR. SAVETT: Excuse me, your Honor.

THE COURT: Yes.

MR. SAVETT: I'd like to object to the relevancy of this answer to the issues in this case.

MR. MARKOWITZ: It shows what their conduct has done, your Honor, the difficulties in coping with this kind of a situation.

THE COURT: Well it does seem to me we're getting into a situation where they may come back in and dispute what the doctor is saying or they may say why she reached this condition and we will be getting into a lot of the many trials. So I'm going to sustain the objection.

(p. 31) BY MR. MARKOWITZ:

Q. Doctor, without describing the specific condition of the patient, can you tell the jury whether or not you were able to afford any explanation to the patient or to afford follow-up care to this patient?

MR. SAVETT: Your Honor, I maintain the same objection. I don't believe it's relevant to the issues in this case.

MR. MARKOWITZ: It shows their interference with his practice and their interference with his ability to practice medicine.

THE COURT: I'll overrule the objection. We'll permit a very limited inquiry along this line and that possibly may be the end of it.

Do you have other questions.

MR. MARKOWITZ: Yes I do.

THE COURT: Well let's hear what the next one is as to that incident and then we'll make a determination as to whether he should be allowed to go that much further.

MR. MARKOWITZ: There's a question pending, your Honor.

(The question was read.)

THE WITNESS: I did have great difficulty explaining to a very irate family why the patient was in this condition. After reviewing a number of records which did (p. 32) appear later, yes, I was able to continue caring for this patient. However I lost the rapport with the family.

* * *

Direct Examination of Jack Surer, D.O.

(p. 61) Q. Do you have patients that want to go to the York Hospital?

A. Yes I do.

Q. What happens when that occurs.

A. Well when I have a patient who requires hospitalization and they express to me that they prefer to go to the York Hospital, I honor their request and I contact one of the ophthalmologists on the York Hospital staff, tell them the nature of the patient's problems and ask them if they would accept the patient for care.

Q. What happens to those patients that go over in that fashion?

A. I don't have any hard and fast figures on that. Some of those patients will go and be treated and they come back to my practice. Some patients do not come back.

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VOLUME III—MORNING SESSION 8/13/82

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 80-0134

MALCOLM WEISS,

Plaintiff,

vs.

YORK HOSPITAL, et al.,

Defendants.

August 13, 1982
Williamsport, Pa.

BEFORE: HONORABLE MALCOLM MUIR and a jury

APPEARANCES:

For the Plaintiff: LEWIS H. MARKOWITZ, ESQ.
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Cross-examination of H. E. Frech III, Ph.D.

(p. 27) Q. That would be to the advantage of Memorial Osteopathic Hospital, as an institution, a hospital, if none of the Doctors of Osteopathy in the York Medical service area were granted privileges at York Hospital, is that correct?

A. Well, at first blush it might seem so, but not necessarily.

Q. Why not?

A. Because of the way referrals work. In my understanding, there's a definite problem with the osteopaths. Currently, if they refer someone to York for a specialist who is not available at the Memorial Osteopathic, or facilities aren't, they often don't get the patient back. The patient switches over to an M.D. primary physician.

Now, if privileges were opened up in the two hospitals, the York G.P.s could then sometimes refer patients to York—sorry. The osteopathic general practitioners in Memorial may sometimes refer patients to York without losing them because they could refer them to an osteopathic physician or one that was sympathetic to osteopathic physicians there and get them back, rather than having them as it is now, tend to lose them.

So, the bottom line is opening up privileges in both hospitals to both kinds of physicians may actually benefit osteopaths in general and through osteopaths in (p. 28) general, Memorial Osteopathic Hospital.

Q. Well, you're saying that it would be of benefit to the physicians at Memorial Osteopathic Hospital. How does that help Memorial Osteopathic Hospital itself?

A. Well, that means the physicians will be able to hold onto their patients better so they will have more patients and so be able to admit more patients to that hospital.

I'm not saying that necessarily would happen, but that seems possible.

* * *

(p. 42) Q. You say you did a study of patient flows with respect to hospital useage. Did you make any study of patient flows with respect to what patients do outside the hospital in terms of which physicians they go to and how often they go there and how far they travel when they go to a physician in his office?

A. No.

Q. Now, you have limited your examination then to just physicians and just what takes places in hospitals, is that correct?

A. By examination, do you mean the study of the patient origin statistics?

Q. The statistics that you looked at.

A. Patient origin statistics only refer to hospital patients.

Q. Did you seek information about other areas of patient conduct?

A. Yes.

Q. What other areas?

A. The most important was referral patterns.

Q. What kind of information did you seek?

A. What I wanted to know was whether when a osteopath referred a patient to an M.D. specialist, if there was a tendency for him to lose the patient, and that was (p. 43) confirmed by several people. And I also wanted to know if M.D., G.P.s ever referred to osteopathic specialists and that was said to be very rare. I believe I read that in a couple of depositions; heard that from other sources.

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VOLUME V—AFTERNOON SESSION 8/17/82

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO.—80-0134

MALCOLM WEISS,

Plaintiff,

vs.

YORK HOSPITAL, et al.,

Defendant.

August 17, 1982
Williamsport, Pa.

BEFORE: HONORABLE MALCOLM MUIR and a jury

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Direct Examination of Alfred DeAngelo, D.O.

(p. 83) THE WITNESS: After having finished my internship at Memorial Hospital, I went into private practice with a fellow classmate at the Derryland Square Of-

fice. And after having been in practice for a short time, I realized that there was a certain number of patients, the patient population, who had had M.D. physicians, allopathic physicians, as their primary care physicians before having come to us and had M.D. allopathic specialists as their specialty physicians. And when they came to me, they expected to be referred back to the M.D. specialty (p. 84) physicians. And of course these specialty physicians practiced at York Hospital.

In the early part of my practice I noticed that a trend developed and that trend was that if I did refer those patients, I didn't see them again. And if I did see them again, sometimes reports were kind of slow to follow them. And at that time I thought that I needed to establish some sort of a rapport at that institution.

After having been in practice for a year and a half, my partner and I decided to expand our economic base. We would have to open a second office, and there was an osteopathic physician who had been in practice for 33 years who was selling his practice, so we purchased the practice.

Many of the people from that area, the York Haven area, had had also M.D. physicians as their primary care physicians, and again some of our first patients whom we had hospitalized requested York Hospital as the hospital where they wanted to be admitted to.

At that time—we purchased that practice by the way in January, January of 1982, and later that month I applied for privileges at York Hospital realizing that to protect my economic base and also to provide better continuing patient care I would need to have privileges at that hospital.

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